United States Court of Appeals

for the Second Circuit

APPENDIX

77-1150

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1150

B pls

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN, and DANIEL FRIEDMAN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX OF UNITED STATES OF AMERICA AND ALL DEFENDANTS

Volume XIV—Pages A-8841 to A-9266

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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SCHEDULE 1 (continued)

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I, Julius L. Ross, Treasurer and Chief Financial Officer of Rio Rancho Estates, Inc., DO HEREBY CERTIFY that the following Balance Sheet of Rio Rancho Estates, Inc., as of April 30, 1974 and the related statements of income and retained earnings were prepared from the books and records of the Company and to my best information and belief properly present the financial condition of the Company as of April 30, 1974 and the results of operations for the year then ended.

RIO RANCHO ESTATES, INC.
BALANCE SHEET
April 30, 1974

ASSETS

Cash	$ 29,913
Mortgages and Other Receivables	441,046
Land and Improvements	9,082,667
Other Inventories	12,583
Property, Plant and Equipment Net of Allowance for Depreciation	576,405
Deferred Marketing Expenses	2,834,771
Advances - Affiliated Corporations	56,083,163
Other Assets	387,947
Total Assets	$ 69,448,495

LIABILITIES

Accounts Payable and Accrued Expenses	$ 936,076
Mortgages and Other Notes Payable	4,696,154
Customer Deposits Payable	994,789
Unrealized Gross Profit	31,290,648
Deferred Sales	5,115,124
Total Liabilities	$ 43,032,791

SHAREHOLDERS' EQUITY

Common Stock	$ 3,000
Capital Contributed in Excess of Par	57,000
Retained Earnings	26,355,704
Total Shareholders' Equity	$ 26,415,704
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY	$ 69,448,495

RIO RANCHO ESTATES, INC.
STATEMENT OF INCOME AND RETAINED EARNINGS
YEAR ENDED APRIL 30, 1974

REVENUES

Homesites	$ 17,099,025
Interest Income on Homesite Contracts	16,990
Deferred Profit Recognized on Homesite Sales	10,522,308
Profit Deferred on Homesite Sales	(7,827,756)
Other Income	72,652
Total Revenues	$ 19,883,219

COSTS AND EXPENSES

Cost of Sales	$ 1,153,250
Commissions, Advertising and Other Selling Expenses	8,837,545
General and Administrative Expenses	3,797,497
Loss on Cancellations	1,476,000
Other Expenses - Principally Interest	187,269
Total Costs & Expenses	15,451,561
INCOME BEFORE FEDERAL INCOME TAXES	$ 4,431,658
PROVISION FOR FEDERAL INCOME TAXES	2,112,746
NET INCOME	$ 2,318,912
RETAINED EARNINGS - BEGINNING OF YEAR	24,036,792
RETAINED EARNINGS - APRIL 30, 1974	$ 26,355,704

A 8844

Accountant's Report

BOARD OF DIRECTORS AND SHAREHOLDERS
AMREP CORPORATION

We have examined the consolidated balance sheet of AMREP CORPORATION AND SUBSIDIARIES at April 30, 1974 and 1973, and the related consolidated statements of income and retained earnings and changes in financial position for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion these financial statements present fairly the consolidated financial position of AMREP CORPORATION AND SUBSIDIARIES at April 30, 1974 and 1973, and the results of their operations and changes in financial position for the years then ended, in conformity with generally accepted accounting principles which, except for the change (with which we concur) in the method of determining income from continuing operations, discontinued operations and extraordinary items described in Note B to the financial statements, were applied on a consistent basis.

New York, New York
June 21, 1974

J.K. Lasser & Company

AMREP Corporation and Subsidiaries

Consolidated Balance Sheet
April 30, 1974 and 1973

Assets	1974	1973
Cash	$ 3,878,366	$ 3,382,660
Marketable securities – At cost which approximates market	3,845,632	4,828,466
Contracts receivable on homesite sales, net of unrealized profit (1974 – $51,000,860; 1973 – $51,990,303)	52,380,267	44,858,043
Mortgages and other receivables	11,246,948	6,276,921
Land and homes for sale – At cost –		
Land and improvements	27,535,488	28,984,869
Homes	5,482,588	5,343,992
Condominium apartments	9,644,107	2,187,870
Construction and other inventories – At cost	575,928	1,109,772
Property, plant and equipment – At cost – Net of allowance for depletion and depreciation	19,291,774	19,639,183
Deferred marketing expenses	7,107,369	10,644,674
Other assets	4,539,111	5,322,511
Excess of cost of investments over net assets acquired	5,216,440	5,388,037
	$150,744,018	$137,966,998

See accompanying notes to the financial statements.

A 8846

Liabilities	1974	1973
Accounts payable and accrued expenses	$ 13,246,950	$ 10,219,145
Mortgages and other notes payable	60,615,786	53,030,426
Customer deposits payable	5,442,023	7,064,093
Deferred Federal income taxes	23,790,992	20,783,992
6% convertible subordinated debentures – Due 1984	1,869,000	3,250,000
	$104,964,751	$ 94,347,656

Shareholders' Equity	1974	1973
Common stock –		
$.10 par value		
Authorized – 5,000,000 shares		
Issued – 3,630,271 shares	363,027	363,027
Capital contributed in excess of par value	14,869,100	14,869,100
Retained earnings	31,589,956	28,503,300
	46,822,083	43,735,427
Treasury stock – At cost – 1974 – 233,785 shares; 1973 – 66,031 shares	(1,042,816)	(116,085)
	45,779,267	43,619,342
	$150,744,018	$137,966,998

See accompanying notes to the financial statements.

AMREP Corporation and Subsidiaries

Consolidated Statement of Income and Retained Earnings
Years Ended April 30, 1974 and 1973

	1974	1973
REVENUES		
Homesites	$52,267,676	$43,692,905
Homes and condominium apartments	21,180,231	17,047,197
Distribution of magazines and paperback books	6,617,404	5,671,842
Interest income on homesite contracts receivable	6,997,719	6,406,519
Deferred profit recognized on homesite sales	16,715,342	16,159,370
Profit deferred on homesite sales	(21,292,579)	(18,801,672)
Other income	4,890,547	3,289,008
Gain on sale of mobile home park	2,065,583	–
	$89,441,923	$73,465,169
COSTS AND EXPENSES		
Cost of sales–		
Homesites	6,531,583	4,823,242
Homes and condominium apartments	17,798,691	14,349,648
Other	1,483,236	1,573,860
Commissions, advertising and other selling	29,041,958	23,129,466
General and administrative	12,853,860	11,236,451
Distribution selling, general and administrative	6,584,887	4,699,903
Loss on cancellations	4,093,591	2,462,236
Interest and loan costs	4,960,461	3,277,616
	$83,348,267	$65,552,422
INCOME FROM CONTINUING OPERATIONS BEFORE FEDERAL INCOME TAXES	6,093,656	7,912,747
Provision for deferred Federal income taxes	3,007,000	3,733,200
INCOME FROM CONTINUING OPERATIONS	3,086,656	4,179,547
Loss from discontinued operations, net of applicable Federal income taxes	–	(987,549)
INCOME BEFORE EXTRAORDINARY ITEMS	3,086,656	3,191,998
Extraordinary items, net of applicable Federal income taxes	–	620,813
NET INCOME	3,086,656	3,812,811
RETAINED EARNINGS–BEGINNING OF YEAR	28,503,300	24,690,489
RETAINED EARNINGS–END OF YEAR	$31,589,956	$28,503,300
EARNINGS PER COMMON SHARE AND COMMON EQUIVALENT SHARE		
Income from continuing operations	$ .90	$1.17
Loss from discontinued operations	–	(.27)
Extraordinary items	–	.17
Net income	$ .90	$1.07

See accompanying notes to the financial statements.

A 8848

AMREP Corporation and Subsidiaries

Consolidated Statement of Changes in Financial Position
Years Ended April 30, 1974 and 1973

	1974	1973
OPERATING CASH RECEIPTS		
Collections on homesite contracts (Principal and interest)	$41,552,961	$38,103,665
Home sales, distribution and other receipts	30,156,484	29,383,630
Proceeds from sale of mobile home park	4,465,000	–
	76,174,445	67,487,295
OPERATING CASH EXPENDITURES		
Land development, construction and other costs	17,764,055	19,761,021
Selling, general and administrative expenses	44,255,891	43,925,886
Other expenses, principally interest and loan costs	5,575,504	3,481,577
	67,595,450	67,168,484
EXCESS	8,578,995	318,811
Land acquisition, net of related debt and increase in construction inventories	(10,271,784)	(7,430,930)
DECREASE IN CASH FROM OPERATIONS	(1,692,789)	(7,112,119)
OTHER SOURCES (USES) OF CASH		
Proceeds from loans	7,000,000	14,203,080
Payment of mortgages, other notes payable, and debentures	(2,128,254)	(3,331,092)
Purchase of treasury stock	(926,731)	–
Sales (purchases) of marketable securities	982,834	(745,397)
Additions to property, plant and equipment	(2,739,354)	(2,098,370)
INCREASE IN CASH BALANCE	495,706	916,102
CASH BALANCE – BEGINNING OF YEAR	3,382,660	2,466,558
CASH BALANCE – END OF YEAR	$3,878,366	$3,382,660

See accompanying notes to the financial statements.

A 8849

AMREP Corporation and Subsidiaries

NOTES TO THE FINANCIAL STATEMENTS

A. Summary of Significant Accounting Policies

Principles of Consolidation

The consolidated financial statements include the accounts of the Company and all its subsidiaries except Trinity Life Insurance Company, whose operations are insignificant. Significant intercompany accounts and transactions have been eliminated in consolidation.

Homesite Sales

The Company sells homesites in communities principally under installment contracts which require payments over an average period of seven years.

Homesite contracts are recorded as sales at the time customers' total payments (principal and interest) amount to at least 10% of the contract price and any refund period has expired. Until a contract qualifies for recording, customer total payments are recorded as deposits. Marketing costs applicable to deposit sales are deferred and charged to income as homesite contracts are recorded as sales.

Income from recorded homesite sales is recognized on the installment basis of accounting. On this basis, the full sales price of a homesite is included in revenues at the time the sale qualifies for recording. Related costs and expenses, consisting of land and improvement costs and marketing expenses, are recorded at the time the sale is recorded. The excess of homesite sales revenues over related costs and expenses is deferred and recognized in income as customers' payments are received, using the average profit rate for each community.

Interest on recorded installment contracts is included in income when it is received.

Upon cancellation of a homesite sale, the excess of the unpaid contract balance over related costs of land and improvements and deferred profit is charged to income. The Company's general policy is to cancel contracts on which no payment has been received for approximately four months. Under extenuating circumstances, the Company may extend this delinquency period.

Home and Condominium Apartment Sales

Sales of houses, mobile homes, condominium apartments and related costs and expenses are recorded at the time of closing. Payments received from buyers prior to closing are recorded as deposits.

Distribution of Magazines and Paperback Books

Revenues from distribution of magazines and paperback books represent commissions and fees earned from the distribution of publications for client publishers. Such revenues are recorded at the time the publications go on sale. The distribution of publications is generally made on a fully returnable basis which is in accordance with prevailing trade practice. Estimated returns are provided by charges to revenues based upon sales experience.

Land and Home Inventories

Land and improvements are stated at cost which include the cost of certain amenities and capitalized interest and real estate taxes. These costs are allocated to individual homesites based upon the total salable homesites within each community.

Homes and condominium apartments completed or under construction are stated at cost.

Property, Plant and Equipment

Items capitalized as part of property, plant and equipment, including certain amenities in homesite communities, are valued at cost.

Expenditures for maintenance and repairs and minor renewals are charged to earnings as incurred while those expenditures which improve or extend the estimated useful life of existing properties are capitalized.

Upon sale or other disposition of assets, the cost and related accumulated depreciation are removed from the accounts and the resulting gain or loss, if any, is reflected in income.

Depreciation and amortization of property, plant and equipment are provided principally on the straight-line method at various rates calculated to amortize the book values of the respective assets over their estimated useful lives. Capitalized costs of discontinued oil and gas operations are being amortized over the estimated recoverable oil and gas reserves.

Excess of Cost of Investments Over Net Assets Acquired

The excess of cost over the net assets of companies acquired prior to October 31, 1970, is not being amortized as management is of the opinion that there has been no diminution of value of the acquired businesses. This value will be reviewed on a periodic basis and an amortization program will be established if future events make such amortization appropriate. The excess of such cost applicable to acquisitions subsequent to October 31, 1970, is being amortized in accordance with Opinion No. 17 of the

Accounting Principles Board.

Federal Income Taxes

The Company and its subsidiaries file consolidated Federal income tax returns. Deferred taxes are provided for the income tax effect of timing differences in reporting transactions for financial and tax purposes. These timing differences result principally from reporting income from homesite sales on a different basis for tax purposes than for financial reporting purposes.

B. Change in Method of Determining Income From Continuing Operations, Discontinued Operations and Extraordinary Items

As prescribed by Opinion No. 30, adopted in 1973 by the Accounting Principles Board of the American Institute of Certified Public Accountants, the Company has changed its criteria for the types of items to be included in determining income from continuing operations, discontinued operations and extraordinary items in the statement of income. Certain types of items were presented in 1973 as discontinued operations and extraordinary items in conformity with accounting principles then generally accepted, and in 1974 were included in determining income before extraordinary items in conformity with the newly issued Opinion. The Opinion prohibits restating the 1973 financial statements for these items. Had the Opinion been in effect for 1973, operating results would have been as follows:

Income from continuing operations	$4,348,980
Loss from discontinued operations	(536,169)
NET INCOME	$3,812,811
Earnings per common share and common equivalent share	
Income from continuing operations	$1.22
Loss from discontinued operations	(.15)
NET INCOME	$1.07

C. Contracts Receivable on Homesite Sales

Homesite contracts receivable bear interest at rates ranging from 5.75% to 8% (weighted coverage 6.89%). At April 30, 1974, approximately 91% of the contracts receivable were current or prepaid.

Estimated collections of principal during the next five years on outstanding contracts receivable, without giving effect to future cancellations, are as follows:

Year to end April 30,	
1975	$21,400,000
1976	20,924,000
1977	19,367,000
1978	16,149,000
1979	11,186,000

Homesite contracts not qualifying for recording at April 30, 1974 and 1973 amounted to $15,709,000 and $22,990,000 respectively. Total receipts on these contracts were $2,633,000 at April 30, 1974 and $2,990,000 at April 30, 1973.

D. Land and improvements

At April 30, 1974 land and improvements comprised:

Projects under development	$20,790,402
Projects not presently under development	4,689,777
Subject to contracts recorded as deposits	2,055,309
	$27,535,488

E. Property, Plant and Equipment

	1974	1973
Land, buildings and improvements	$ 4,870,965	$ 4,397,217
Furniture and fixtures	2,380,889	2,632,963
Automotive and construction equipment	1,680,295	1,804,260
Utility plant and equipment	7,133,127	5,641,108
Motels, rental properties and golf clubhouses and facilities	6,935,606	7,685,229
	23,000,882	22,160,777
Less: Allowance for depreciation	4,548,946	3,933,251
	18,451,936	18,227,526
Net book value of oil and gas producing properties and equipment	839,838	1,411,657
	$19,291,774	$19,639,183

During 1973 oil and gas operations were discontinued and oil and gas producing properties and equipment were adjusted to the net realizable value of estimated oil and gas reserves at April 30, 1973.

Depreciation and depletion charged to operations amounted to $1,284,999 in 1974 and $1,599,629 in 1973.

F. Other Assets

	1974	1973
Investment in Trinity Life Insurance Company – At equity	$ 182,717	$ 280,297
Prepaid expenses, deposits, etc.	2,005,585	2,439,242
Deferred charges	2,350,809	2,602,972
	$ 4,539,111	$ 5,322,511

G. Mortgages and Other Notes Payable

	1974	1973
Notes payable to General Electric Credit Corporation (1)	$37,000,000	$30,000,000
Mortgages payable collateralized by land (of which $3,100,000 is non-recourse) bearing interest at rates from 0% to 8-1/2%	11,269,224	14,934,437
Mortgages payable on buildings, equipment and homes, etc. bearing interest at rates from 6-1/2% to 11-1/4%	5,991,388	6,105,468
Construction loans payable collateralized by homes and buildings under construction, bearing interest at rates from 7-1/2% to 10% (and one loan in the amount of $2,376,370 which bears interest at 3% over the prime rate)	6,355,174	1,990,521
	$60,615,786	$53,030,426

(1) The loan agreement provides for borrowings of up to $40,000,000 which mature on April 30, 1977.

With respect to loans in excess of $30,000,000, bank participation is required to the extent of one-half of such borrowings.

These loans bear interest at 3% over prime rate, limited to a minimum of 8-1/2% and a maximum of 12%, and are collateralized by all homesite contracts receivable and the capital stock of two subsidiaries. The agreement provides, under certain conditions, for additional loans of up to $10,000,000.

The loan agreement imposes restrictions on certain investments, tangible net worth, consolidated debt, the sale of substantially all assets and properties, mergers, etc. The Company has agreed not to declare or pay cash dividends or purchase shares of its common stock in excess of retained earnings available for such actions, as defined in the loan agreement. At April 30, 1974 approximately $5,300,000 of retained earnings was available for such purposes.

Payments of principal required on the foregoing mortgages and notes are as follows:

Year to end April 30,	
1975	$10,889,464
1976	1,995,182
1977	37,992,129
1978	704,522
1979	708,742
Thereafter	8,325,747
	$60,615,786

H. Estimated Cost of Homesite Improvements

The unexpended cost to complete required improvements to areas from which homesites have been and are presently being sold is estimated to be $15,000,000.

Estimated homesite improvement costs are determined by internal engineering studies of work to be performed and the estimated cost to perform such work, including anticipated cost inflation.

The Company estimates its expenditures for improvement obligations existing at April 30, 1974 will be $1,500,000 annually over the next five years.

I. 6% Convertible Subordinated Debentures — Due May 1, 1984

The debentures are payable in annual installments of $720,000 beginning May 1, 1974. They are redeemable at any time and are convertible into common stock at $42 per share (subject to adjustment for stock splits, stock dividends, etc.). At the time of and only in connection with conversion, the holder of the debenture being converted has the right to purchase up to five shares at $40 per share for each $1,000 principal amount of debentures converted. This price per share is subject to the adjustments described above and, in addition, may be reduced, at the Company's option, by up to 40% for a period not in excess of 60 days.

In May 1972 $300,000 principal amount of debentures were converted into 7,142 shares of common stock, and purchase rights for 1,500 shares expired. At April 30, 1974 the Company holds $2,000,000 of its own debentures, of which $1,000,000 was purchased in April 1973 and $1,000,000 was purchased in March 1974.

On April 30, 1974 the Company paid to the Trustee the annual payment due on May 1, 1974. From this payment $381,000 will be applied in reduction of outstanding debentures and has been so reflected on the consolidated balance sheet. The balance of $339,000 applies to repurchased debentures and will be returned to the Company.

At April 30, 1974 a total of 53,845 shares were reserved for future conversions and exercise of purchase rights.

The debenture agreement contains, among other things, limitations less restrictive than those contained in the loan agreement (Note G), on additional borrowings, cash dividends, purchases of the Company's common stock, etc.

J. Stock Options

In September 1973 the shareholders approved a new stock option plan for 100,000 shares to replace the previous plan which expired.

At April 30, 1974 options were outstanding to purchase 62,574 shares of common stock at various dates to December 1978. Changes during the two years ended April 30, 1974 in options outstanding are summarized as follows:

	1974	1973
Outstanding — Beginning of year	72,074	63,700
Granted	2,500	94,958
Cancelled	(12,000)	(86,584)
Outstanding — End of year	62,574	72,074

Under the plan, options are exercisable cumulatively at the rate of 25% annually commencing one year after the date of grant. The outstanding options were granted at the market price on the date of grant. At April 30, 1974 99,000 shares were reserved for future option grants.

K. Retirement Plans

The Company has retirement plans covering employees meeting the eligibility requirements. Total retirement expense for 1974 and 1973 was $350,782 and $263,614 respectively. The Company's policy is to fund accrued retirement costs.

L. Commitments and Contingencies

(a) At April 30, 1974, the Company is obligated under long-term non-cancelable leases for data processing equipment and various real estate properties which expire at various dates to 1982. Certain real estate leases generally provide that the Company will pay for taxes, maintenance, and insurance costs and include renewal options. Rental expense is included in costs and expenses as follows:

	Year Ended April 30,	
	1974	1973
Financing leases	$ 227,000	$208,000
Other leases	801,000	700,000
	$1,028,000	$908,000

The approximate minimum rental commitments for the years subsequent to April 30, 1974, are as follows:

		Financing Leases	Other Leases
Fiscal Year Ending In	Total	Data Processing Equipment	Real Estate
1975	$ 685,300	$147,300	$ 538,000
1976	613,200	111,200	502,000
1977	553,000	104,000	449,000
1978	372,900	9,900	363,000
1979	229,000		229,000
1980-1982	183,000		183,000
	$2,636,400	$372,400	$2,264,000

The present value (determined by using assumed interest rates of 9 to 13%) of the minimum rental commitments for the non-capitalized financing leases amounted to approximately $320,000 at April 30, 1974. If all non-capitalized financing leases were capitalized, the difference in the computed amortization and interest cost and the related rent expense, would have an effect on net income for the year ended April 30, 1974, of less than 3% of the average net income for the most recent three years.

(b) The Company has guaranteed payment of $215,000 of customer mortgage on mobile homes.

(c) The Federal Trade Commission ("FTC") and the U.S. Attorney for the Southern District of New York, before a Grand Jury, are investigating matters relating to the Company's developments. The Company believes that both investigations are part of broader investigations involving a number of companies engaged in the land development business.

The Company has no knowledge of what actions, if any, the FTC or the Grand Jury may take upon completion of their investigations, or whether any actions either may take will result in any liability on the part of the Company or have any material adverse impact on the Company's business. The Company believes that it has conducted its business in compliance with applicable laws and regulations.

M. Sales of Mobile Home Park

In February 1974 a subsidiary of the Company sold its mobile home park for $4,665,000 of which $3,433,000 was received in cash (after payment of $1,032,000 of mortgage debt) and $200,000 was placed in escrow to be released upon satisfaction of certain conditions. In connection with the sale the subsidiary has agreed to continue selling mobile homes until April 30, 1976 or such earlier date coincident with attaining a specified monthly rent roll, and pay to the buyer any deficiency between the specified rent roll and actual rent roll during that period. The gain on this sale amounted to $2,065,583 after provision for the subsidiary's obligation described above.

N. Earnings Per Share

Earnings per common share and common equivalent share are based on the weighted average number of common shares outstanding during each year. For this computation, outstanding shares were adjusted to reflect as common equivalent shares, the assumed exercise of certain stock options.

No dilution of earnings per share results from the assumed conversion of the 1984 debentures and exercise of related purchase rights and other outstanding stock options.

O. Discontinued Operations

A summary of the loss from discontinued operations during the year ended April 30, 1973 is as follows:

Oil and gas	$9[illegible]228
Publishing	54,321
	$987,549

P. Extraordinary Items

A summary of extraordinary items during the year ended April 30, 1973 is as follows:

Gain on sale of Damson Oil Corporation stock, net of Federal income taxes of $517,000	$ 559,380
Gain on purchase of the Company's 1984 debentures, net of Federal income taxes of $156,400	169,433
Writeoff of investment in publishing company, net of Federal income taxes of $108,000	(108,000)
	$ 620,813

A 8853

NEW YORK REAL PROPERTY LAW

337-c Right to Cancel

Whenever a contract of sale or lease of subdivided lands is entered into, or an offer to purchase or lease such land is made by the purchaser, lessee or offerer delivering the executed agreement or offer personally to the subdivider or any officer, director, employee or agent thereof, at the subdivision, or at a meeting or gathering of any type arranged by the subdivider, or any officer, director, employee or agent thereof, within or without the state, and the purchaser, lessee or offerer is not represented in such transaction by an attorney, the purchaser, lessee or offerer, in addition to any other rights, shall have the right to cancel the agreement, offer, or any agreement effected by the acceptance of such offer within ten days of such delivery, by giving the subdivider notice of cancellation at the address listed in the offering statement filed by the subdivider, by registered or certified mail return receipt requested. Within ten days of receipt of such a notice of cancellation the subdivider shall return to the purchaser, lessee or offerer all consideration paid or delivered on account of such contract of sale or lease or offer. The subdivider shall deliver a copy of this section to the purchaser, lessee or offerer at the time such person shall personally deliver the executed agreement or offer.

Notice of Cancellation

RIO RANCHO ESTATES, INC.
Name of Subdivision

Print Name of Party to Transaction

Print Name of Additional Party

Address

Address

You may cancel this transaction, without any penalty or obligation whatsoever, at any time within ten (10) days after the date of the transaction.

If you cancel, all payments made by you on account of the purchase will be refunded within ten (10) business days after receipt of your notice.

To cancel this transaction send this notice or other written notice by certified or registered mail, with a return receipt requested, to Rio Rancho Estates, Inc., Att: Broker Services, at 3900 Southern Blvd. S.E., Rio Rancho, New Mexico 87124, not later than midnight ten (10) days from the date of the transaction.

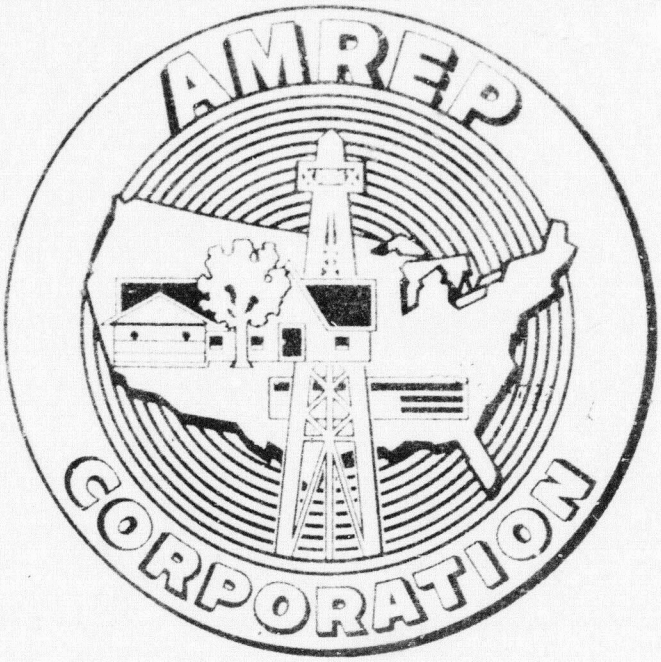
I (we) hereby cancel this transaction.

Date

Signature

Signature

A 8854



A 8855

R Nº 65029

AFTER THE EXPIRATION OF ONE YEAR FROM THE DATE HEREOF, THIS OFFERING STATEMENT CANNOT BE DISTRIBUTED FOR THE PURPOSE OF SOLICITING PURCHASERS OF THE LOTS HEREIN BEING OFFERED FOR SALE.

R Nº 65029

RECEIPT OF OFFERING STATEMENT

I (we) hereby acknowledge receipt of the Offering Statement for Rio Rancho Estates, RR-200-22, dated December 24, 1974 , as amended.

Signed .....

Address .....

Date & Time of Receipt .....

Name of Salesman .....

A 8856

EXHIBIT C

NEW YORK OFFERING STATEMENT

APPENDIX D-1

The following quotations set forth in paragraph 18(i) of the Indictment were contained in advertising materials submitted to the New York Department of State which were approved by the Department for use and assigned the NYA numbers indicated.

"The history of land prices all around Rio Rancho Estates as well as Albuquerque proper over the past 20 years show prices doubling and redoubling again and again every few years."	NYA 388-62
"In this booming resort area, where it has been typical for land prices to jump 200%, 300% even more in a few short years, you can control choice acreage worth thousands of dollars right now.....all you need is a small deposit."	NYA 388-62
"In the past 20 years, land prices in the Albuquerque area have increased at a rapid pace, averaging about 25% per year but in many cases accelerating as much as 300 to 400% in a given year."	NYA 822-16 NYA 72-397
"In the past when American Realty and Petroleum Corporation [AMREP] announced plans for a new community, prices on adjacent properties almost instantly jumped 100 to 300%."	NYA 822-16
"Land values in the vicinity of Albuquerque have consistently risen by an average of more than 25% per year since 1971 -- and may climb even faster."	NYA 72-537 NYA 822-19 NYA 388-8 NYA 388-59
[The purchase of lots at Rio Rancho Estates provides] "the chance of reaping future rewards with a relatively small speculative investment in an area where land values have shown a consistent tendency to steadily climb. It is a demonstrable fact that land prices in general in the Albuquerque area have increased 20, 30, even 50 times or more in the past 20 years."	NYA 822-19 NYA 388-59

APPENDIX D-2

The following quotations set forth in paragraph 18(j) of the Indictment were contained in advertising materials submitted to the New York Department of State which were approved by the Department for use and assigned the NYA numbers indicated.

an "investment" in lots at Rio Rancho Estates was "one of the surest and safest ways to make handsome returns on your investment."	NYA 822-16
"only our low mark-up, large-volume policy makes such an outstanding land bargain possible."	NYA 72-537 NYA 822-19 NYA 388-8 NYA 388-59
"we feel quite safe in saying: if you acquire land holdings now at Rio Rancho Estates while our prices are still low, you have every right to expect that your land should rise substantially in value over the coming years"	NYA 822-19 NYA 388-8 NYA 388-59
"you may resell all or part of your property anytime you wish."	NYA 388-8 NYA 72-537 NYA 822-19 NYA 388-59

APPENDIX D-3

The following quotations set forth in paragraph 18(1) of the Indictment were contained in advertising materials submitted to the New York Department of State which were approved by the Department for use and assigned the NYA numbers indicated.

"with the population of Albuquerque expected to double and redouble every ten years with land reflecting an upward trend...newcomers are being forced by the law of supply and demand to pay higher and higher prices for choice home-site land"	NYA 822-19 NYA 388-8 NYA 388-59
"Now with Albuquerque's population predicted to almost double once again by 1980 or so -- one does not have to be an expert to predict that land prices in our area should continue to reflect increasing population pressures....and perhaps at an even livelier pace as population pushes more and more into the growing Northwest Mesa neighborhood where Rio Rancho Estates is located!"	NYA 72-537 NYA 822-19 NYA 388-8 NYA 388-59
"Many people at Albuquerque who are familiar with local real estate values and know the direction that Albuquerque's growing population must take in its search for homesites, are going out of their way to make monthly payments on 2 to 10 acre tracts...larger holdings which could lead to a sizeable retirement 'nest egg' if land values continue to double and redouble as they have over the recent past."	NYA 72-537 NYA 822-19 NYA 388-8 NYA 388-59

APPENDIX D-4

The following quotations set forth in paragraph 18(p) of the Indictment were contained in advertising materials submitted to the New York Department of State which were approved by the Department for use and assigned the NYA numbers indicated.

"Water. Water is the key to Southwest growth. Thanks to our dream location, with 3 miles of frontage right on the river...and every inch of property within the Rio Grande Basin itself... We can tap all the gracha water we need to make living really attractive for you at Rio Rancho Estates." NYA 388-62 NYA 72-346

"WATER -- Even though water is sometimes a problem in the Southwest, it's good to know that Albuquerque is abundantly supplied. At Rio Rancho we have an underground system which can tap water for a community many times our present size. And if the community should grow beyond our estimates in the next few years, all we have to do is sink another well and draw more water from the vast underground streams below, because most of Rio Rancho is located in the water-rich Rio Grande Basin. NYA 72-534

But that's not all. Recently, the Bureau of Reclamation opened the valves marking the completion of the $84.5 million San Juan-Chama project which brings water from Colorado River tributaries through mountain tunnels under the Continental Divide into the Rio Grande. This mighty new water supply for Albuquerque [illegible] completion is [illegible] to meet [illegible]

"The completion of the San Juan-Chama Diversion Project, which finally [illegible] the Albuquerque-Rio Rancho area a water supply for at least 100 years." NYA 72-537

A 8861

EXHIBIT E

STATE OF NEW YORK
DEPARTMENT OF STATE
270 BROADWAY
NEW YORK 7, N. Y.

CAROLINE K. SIMON
SECRETARY OF STATE

F. WILLIAM GUMA
COUNSEL

July 11, 1963

Royall, Koegel & Rogers
100 Broadway
New York 5, New York

Attention: Edward B. Winslow, Esq.

Re: Rio Rancho Estates

Gentlemen:

Mr. Casa and I have carefully reviewed the proposed advertising booklet, "Rio Rancho Roundup", which is proposed to be used by the Rio Rancho Subdivision in its forthcoming advertising campaign.

Please be advised that the eight-page booklet is accepted for filing with the express understanding that the recommended changes be incorporated and that the legend as required by Section 337 b 5 of Article 9-A of the Real Property Law appear on the face of the said booklet. The New York advertising number assigned to the Rio Rancho Subdivision is NYA - 380.

Please be assured of this Department's desire to be of assistance in all matters which come within its appropriate jurisdiction.

Very truly yours,

CAROLINE K. SIMON
Secretary of State

By: Edward V. Colucci
Edward V. Colucci
Associate Attorney

LVC:ev

A-8862 EXHIBIT F

STATE OF NEW YORK
DEPARTMENT OF STATE
270 BROADWAY
NEW YORK 7, N. Y.

JOHN P. LOMENZO
SECRETARY OF STATE

F. WILLIAM GUNA
COUNSEL

September 30, 1963

Rogall, Koegel and Rogers
200 Park Avenue
New York 17, New York

Attention: Edward B. Winslow

Re: Rio Rancho Estates

Gentlemen:

I have received and read the proposed advertising material submitted by you which are referred to as "Land Investors Report" and the "Reservation Form". The said material has been considered within the framework of Article 9-A of the Real Property Law and the applicable Rules and Regulations promulgated thereunder.

As a result of such review, I must advise you that both documents are not, in their present form, acceptable for filing. The text of the "Reservation Form" and the "Land Investors Report" reads as though the land being offered was in the City of Albuquerque. It is suggested that they be made patently to the prospective purchaser that he is not being offered land within the City of Albuquerque. Put another way, it should be made crystal clear that the land being sold is Rio Rancho land and no other. Accordingly, both documents are not accepted for filing.

Sincerely,

JOHN P. LOMENZO
Secretary of State
By:

Edward A. Allieri
Assistant Counsel

EAA:sc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	75 Cr. 1023 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW

This memorandum is submitted in support of motions made by defendants Howard W. Friedman and Henry L. Hoffman for:

1. a dismissal of the indictment pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure and the Fifth Amendment to the United States Constitution because its prosecution would violate due process;

2. a dismissal of the indictment pursuant to Rules 7(c) and 12(b)(2) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the United States Constitution because the charges are vague and the indictment fails specifically to apprise defendants of the particular conduct claimed to be criminal;

3. an inspection by the Court of the minutes of the grand jury proceedings pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure and a dismissal of the indictment pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure and the Fifth Amendment to the United States Constitution because the grand jury was misled by the government's failure to inform it of the existence of exculpatory evidence and the legal significance of certain of that evidence as an absolute defense; and

4. an order pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure striking prejudicial surplusage from the indictment.

INTRODUCTION

The Indictment

The indictment charges all defendants with seventy counts of mail fraud (18 U.S.C. §1341) (Counts 1-70) and all defendants except Oberman with interstate land sales fraud (15 U.S.C. §1703[a]) (Counts 71-80). Both series of charges plead the conduct of defendants' land sales business over a 14 year period as amounting to a "scheme to defraud", and are premised on the claim that "the overwhelming majority" of Amrep's 45,000 Rio Rancho Estates customers were misled by defendants' allegedly false representation that purchases of lots were "safe and secure financial investments which

would appreciate rapidly and greatly in market value and could be resold at a substantial profit" (Indictment, paragraph 14, pp. 3-4).

The indictment is not couched in precise terms, but rather, uses language susceptible to differing interpretations to describe the representations charged as fraudulent. As submitted in Point III, infra, the vague language used in the charging paragraphs of the indictment (Paragraphs 14, 15 and 16) is insufficient to apprise defendants with certainty of the particular falsities they should prepare to defend.

Aside from the vague and imprecise language purporting to describe alleged false representations, the indictment completely fails to define the claimed victims of the scheme in any ascertainable manner. Thus, the putative victims are characterized as the "overwhelming majority" of defendants' customers and referred to throughout the indictment as "the persons to be defrauded." Yet the indictment provides no guideline as to which of defendants' 45,000 customers the government will claim falls within "the overwhelming majority".

Thus, the prosecution is free under the present indictment to define at will during the trial both the

manner in which representations were false and those persons it claims were defrauded (see Point III, infra).

Not only is the indictment vague, but it also contains open-ended allegations, prejudicial and inflammatory surplusage, argumentative assertions and claims of falsity which are incapable of proof at the present time. The allegations, which are detailed below, should be stricken from the indictment (see Point IV, infra).

The Grand Jury Investigation

The grand jury investigation* which resulted in the instant indictment commenced in March, 1974. The lengthy investigation spanned 20 months and involved production of tens of thousands of company documents; testimony of hundreds of witnesses, including present and former company employees; and compelled testimony of the individual defendants (except Messrs. Oberman and Friend) on the question of compliance with certain subpoenas duces tecum. Solomon H. Friend, Amrep's general counsel, voluntarily testified before the grand jury on 11 separate occasions.

Additionally, the government solicited information through a series of questionnaires mailed to a large number of Amrep's customers and presumably submitted at

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* In February, 1975, following the expiration of the term of the grand jury which commenced the investigation, a second grand jury was impaneled, and presumably, at least a portion of the evidence which was presented to the first grand jury was again presented to the second.

least a portion of the responses as grand jury exhibits.

During the course of the long investigation and following the filing of the indictment on October 28, 1975, counsel for defendants debriefed witnesses who had testified before the grand jury and others who had been interviewed by the prosecution but never called to testify in the grand jury.

As set forth more fully in the affidavits of Stanley S. Arkin and Mark S. Arisohn submitted in support of defendants' motions, there is abundant evidence that the prosecution failed to inform the grand jury of exculpatory testimonial and documentary evidence bearing directly on the charges in the indictment. The prosecution also intimidated an immunized key grand jury witness who, in his interviews with the prosecutors, persisted in expressing his belief in the lack of merit of the prosecution's theories of criminality. By misleading the grand jury and shunting aside evidence known to be exculpatory to defendants, the prosecution so seriously abused the grand jury process that dismissal of the indictment is warranted (see Point II, infra).

The nature of a significant portion of evidence

known to the prosecution but not properly and fairly dealt with in the grand jury was that which focused upon the approval by government agencies of defendants' advertising and promotional literature and defendants' compliance with rules and regulations governing the sale of subdivided land and preparation of disclosure documents. As was known to the prosecution, defendants had consistently contended that the basic sales program and representations central to it had been reviewed and approved by governmental agencies as lawful. Indeed, defendants' reliance on governmental approval of their conduct as an absolute defense to charges of criminal fraud was explicitly presented to the prosecution in August, 1975 in a brief addressed to Paul J. Curran, then U.S. Attorney, in an effort to dissuade the U.S. Attorney's Office from recommending prosecution.

The net result of the prosecution being informed of the regulatory mechanism for government approval of defendants' sales representations was a blatant sculpturing of the indictment in anticipation of that defense.

Indicative of the prosecution's imbalance in

conducting its grand jury presentation is the fact that a senior attorney with New York's Department of State, who was interviewed by the prosecutrix following the receipt of the brief in August, 1975, was not called before the grand jury despite his insistence that sales representations charged as fraudulent in the indictment were reviewed and permitted by New York State.

As submitted in Point I below, defendants' reliance on government review and approval of the conduct of its land sales business and its advertising constitutionally bars this prosecution and requires the dismissal of the indictment.

POINT I

PROSECUTION OF THIS INDICTMENT VIOLATES DUE PROCESS BECAUSE THE ACTS ALLEGED AS CRIMINAL, TO WIT, THE REPRESENTATIONS, DISCLOSURES, AND SALES PRACTICES, WERE REVIEWED AND APPROVED AS LAWFUL BY GOVERNMENTAL AGENCIES, AND DEFENDANTS RELIED ON THAT REVIEW AND APPROVAL TO GUIDE THEIR CONDUCT

Summary of Argument

The sale of subdivided land has been subject to close and exacting government regulation. The State of New York, other states in which defendants have conducted their land sales business, and the federal government enforce regulatory machinery which strictly controls the sale of undeveloped land by (1) mandating comprehensive disclosure of facts to consumers in a form largely dictated by rules and regulations; (2) requiring truthful and complete advertising; and (3) outlawing certain sales practices.

These agencies have reviewed and examined defendants' factual disclosures for compliance with land sales law requirements as well as for their truth and accuracy. All advertisements and promotional literature used in New York were inspected for form, language, and content and were approved prior to use. This review and approval is based in significant part on independent investigation, on-site inspections of Rio Rancho Estates and the monitoring of sales presentations.

Defendants have relied on the acceptance by the regulators of their disclosure statements, official approval of their advertising, and continuous government permission to sell Rio Rancho Estates as authoritative guidance that they were conducting their business properly and lawfully.*

The indictment at bar which charges that the defendants' sales of Rio Rancho Estates were part of a "scheme to defraud," that the disclosure statements and sales contracts were "ambiguous, incomplete, inaccurate, and incomprehensible," and that the company's advertising was "false and misleading" flies in the face of 14 years of continuous government review, examination, and acceptance of defendants' disclosure statements, approval of advertising, and permission to sell Rio Rancho land.

Prosecution of this indictment, accordingly, violates due process. The indictment should be dismissed.

*Indeed, with full knowledge of a proceeding commenced by the Federal Trade Commission in March, 1975, and of the 20-month long grand jury investigation which led to this indictment, the governmental agencies have permitted defendants to continue to sell lots at Rio Rancho Estates.

Factual Background

A. Continued Permission Has Been Given by the Government to Sell Rio Rancho in Light of the Review of Sales Materials and Methods

1. Federal Regulation

The authority and responsibility for administering and carrying out the purpose of the Interstate Land Sales Full Disclosure Act (15 U.S.C. §§1701-1720) ("The Act") was delegated by Congress to the Department of Housing and Urban Development ("HUD") (15 U.S.C. §1715[a]).* The Office of Interstate Land Sales Registration ("OILSR") was established by HUD and through rules and regulations promulgated under 15 U.S.C. §1718, OILSR is charged with day-to-day administration of the Act (24 C.F.R. §§1700.10[a], 1700.15 [1973]).

The Director of the Examination Division of OILSR is charged with the authority and responsibility "to receive and examine all statements of record * * * and property reports filed under the provisions of the * * * Act" and to "determine the adequacy of disclosure of statements of record and property reports * * * necessary to achieve the purposes of the * * * Act" (24 C.F.R. §§1700.80[a], [b][1973]).** (Emphasis supplied.)

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* The purpose of the Act was to "prohibit the sale of land by use of the mails or other channels of interstate commerce through misrepresentation of material facts relating to the property." (U.S. Code Cong. and Admin. News 1968, p. 3066.)

** Under OILSR rules and regulations effective in 1972, statements of record including the property report were received by the administrator "for determination of (1) completeness of the statement, *** and (3) adequacy of disclosure" (24 C.F.R. §1720.40[a][1972]). (Emphasis supplied.)

If,on examination, the disclosure statements are determined inadequate to achieve the purposes of the Act, the Director of the Examination Division must recommend that the Administrator find such statements "not effective" with the result that land sales would be prohibited (24 §1700.80[c][1973]; 24 C.F.R. §1710.45[a][1][1972]; 24 C.F.R. §1710.45[a][1][i][1969]). The Act further empowers HUD to suspend a registration and prohibit sales if it appears "that a statement of record * * * is on its face incomplete or inaccurate in any material respect" (15 U.S.C. §1706[b]), or "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading" (15 U.S.C. §1706[d]).

In making its determination of "adequacy" of disclosure, OILSR employs a field review staff to independently investigate the truth and propriety of disclosure statements and advertising sales practices (Federal Register, Vol. 40, No. 229, Nov. 26, 1975, pp. 55164-55165).

To be sure, both the Act (15 U.S.C. §1716) and the regulations (24 C.F.R. §1710.32[1973]) disclaim that filings found to be effective constitute the administrator's acquiescense in a statement of record or property report which is false or misleading. But the plain fact is that the regulatory agency is charged with the responsibility of reviewing and examining disclosure statements in order to determine and pass its

official judgment on the adequacy of disclosure. By finding a disclosure effective rather suspending, as it must, a registration containing false or misleading statements or omissions, the government, in a very real sense, officially finds that the disclosure satisfies the Act and authorizes the developer to continue its land sales business as proper under federal law.

Indeed, as detailed in the affidavit of Edward B. Winslow, defendants have been informed by OILSR on 11 separate occasions since 1969 that their disclosure statements were examined and that the examination revealed that the filing conformed to the requirements of the Act and the Regulations. (See Winslow affidavit and Exhibits B1-B11 annexed thereto.)

2. State Regulation

Like OILSR, New York's Department of State reviews and approves the disclosure documents ("offering statement") required to be filed under New York's Real Property Law, Article 9-A.* (See 19 N.Y.C.R.R. 135.11). There can be no approval of an offering statement, however, unless "an inspection of the subdivision has first been made * * * [of] the property embraced and described

*Like the federal statutes, the expressed legislative intent in enacting Article 9-A was to prohibit fraudulent practices in connection with the sale of subdivided lands. See e.g., 1960, Op. Atty. Gen. 65.

in the statement" (19 N.Y.C.R.R. 135.12[a], and see Real Property Law, §338).

The Department of State, too, is empowered by statute to seek to enjoin "fraudulent practices" in connection with the sale of land and to stop the sale of lots if it determines that the offering or sales are fraudulent in any way (Real Property Law, §339-c.l.).

As detailed in the affidavit of Edward B. Winslow, since 1963 the Department of State has inspected each and every lot which has been offered for sale in New York prior to accepting and approving each offering statement submitted. And in light of the knowledge gained by its inspections, the Department has, over a 14-year period, approved the disclosures made to prospective purchasers in the offering statement.

3. Regulation by Other States

As with New York's Department of State, the land sales administering agencies in six other states--Kansas, Michigan, Nebraska, New Jersey, Ohio and Pennsylvania have inspected the property at least once. In all but Nebraska and Ohio, disclosure documents are required and either have been written or approved by the administering agency.

In Ohio, following the inception of Rio Rancho, an application was filed with the State of Ohio Division of Securities

in 1962 to register the sale of Rio Rancho lots pursuant to Ohio Revised Code, Section 1707.33. On January 12, 1963, and February 14, 1966, after review of the exhibits submitted by the Company, the reports of the Examiners of the Ohio Division of Securities, an inspection of Rio Rancho, and other information developed by Ohio's investigative process, the Ohio Division of Securities issued an order, finding specifically as follows:

> "1. That the business of [Rio Rancho Estates, Inc.] is not fraudulently conducted;
>
> 2. That the proposed offer * * * [of lots] is not on grossly unfair terms;
>
> 3. That the plan * * * and sale of the * * * lots did not defraud or deceive or tend to defraud or deceive persons."

B. The Contents of Disclosure Statements and Sales Contracts Are Reviewed and Examined by the Federal and State Governments and, to a Large Degree, the Language of the Documents and Contracts is Dictated by Government Regulation

1. Federal

The indictment challenges the Company's disclosure reports and contracts as "ambiguous, incomplete, inaccurate, and incomprehensible to a person of ordinary experience and understanding particularly as the information related to * * * the suitability of the lots as 'homesites' and 'commercial' lots; the availability of water; the Company's obligation to provide water, utilities, and other customary amenities to the lots sold; the 'exchange privilege'; and the availability

and feasibility of providing water and utilities to the lots sold and offered for sale" (Indictment, Paragraph 18[g][xxi]). Yet, defendants' contracts and disclosure statements are subject to close scrutiny by federal and state regulatory agencies and to a significant degree are a product of the agencies, their rules, and governing statutes.*

Significantly, the very items characterized by the indictment as "ambiguous, incomplete, inaccurate, and incomprehensible" are specifically disclosed in the style and format required by the regulations.**

Like the statement of record, the format, style, and content of the property report are dictated by statute (15 U.S.C. §1707) and regulation (24 C.F.R. §1710.110 [1973], 24 C.F.R. §1710.1[illegible] [1972], 24 C.F.R. §1710.110 [1971]; 24 C.F.R. §1710.110 [1969]).

*The Act sets forth the information which the Statement of Record "shall contain" (15 U.S.C. §1705); the regulations mandate the format for the Statement of Record and set forth detailed instructions for preparing and a series of questions to be answered in the Statement of Record (24 C.F.R. §1710.105)[1973]; 24 C.F.R. §1710.1[illegible] [1972]; 24 C.F.R. §1710.105 [1971]; 24 C.F.R. §1710.105 [1969.]).

**Thus, Part IV of Regulation §1710.105 (1973) details the informati[illegible] to be disclosed regarding the topography and physical characteristics of the subdivision; Part VI requires a summary of the terms and conditions of the contract of sale and mandates that all forms of contracts be annexed; Part VII provides for disclosure of access including information as to whether the developer or purchaser is responsible for improvements, the estimated cost to the purchaser if he is responsible, and documentation regarding the developer's obligations to provide improvement to access. Part VIII provides for comprehensive disclosure regarding water, electricity, gas, telephone, and sewage disposal. With respect to each, there must be disclosure as to availability to individual lots, whether the supplier is a public or privately owned entity, the estimated schedule for extension of the utility to individual lots, and the estimated cost of installation or construction to be borne by the purchaser.

Nearly identical regulations have been in effect since 1969 (see e.g., 24 C.F.R. §1710.105 [1969], parts I-XV).

Again, disclosure of the items charged in the indictment to be "ambiguous, incomplete, inaccurate, and incomprehensible" is governed by federal regulations which pose questions for answer* and contain detailed "instructions [which] must be followed in completing the property report" (24 C.F.R. §1710.110, Part B, Paragraph [1][1973]).

As for the allegation of incompleteness, it is significant that the property report may contain information other than that specifically called for in the regulations only when "it appears to the Secretary that the inclusion of such additional information is * * * necessary for the protection of purchasers or necessary to make the required statements not misleading * * *" (24 C.F.R. §1710.110, Part B, Paragraph 1.d.[1973]; see also 24. C.F.R. §1710.110, instructions for requirements for Property Report, Paragraph [c] [1972], [1971]; 24 C.F.R. §1710.110, Instructions for Completing Property Report, Paragraph [e] [1969]). Thus, the burden is on the government to call for inclusion of additional information in the property report.

2. New York State

Regulation of the disclosure statement by New York

*Disclosure is required as to the sales contract (Item 4), availability, costs to buyer, and completion dates for roads, water, electricity, gas, telephone, and sewage (Item 10), and sufficiency of the water supply to serve the anticipated population (Item 11). And in certain instances the answers which must be included in the property report are provided verbatim in the regulations (24 C.F.R. §1710.110, Part C [1973], see also 24 C.F.R. §1710.110 [1971];24 C.F.R. §1710.110 [1969]).

State is similar to federal regulation. Section 337-b. of the New York Real Property Law provides for disclosure of particular information which the offering statement "shall contain," including a description of the subdivision, data concerning improvements such as streets, water supply, sewage, estimated costs, dates of completion, and responsibility for construction. As with OILSR's control over contents of the property report, disclosure of additional information in the offering statement may be required by New York's Department of State "as it may deem relevant" (Real Property Law, §339-b.).

Indeed, as detailed in the affidavit of Edward B. Winslow, the New York Offering Statements used by the company since 1969 reflect a substantial rewriting done by counsel for the Department of State.

Among the documents which must be submitted to and approved by the Department of State is the form of sales contract to be used in the sale of lots. Section 135.2 of the New York Official Compilation of Codes, Rules and Regulations (19 N.Y.C.R.R. 135.2) sets forth detailed requirements for the sales contract and specifies certain provisions which such contracts must contain and certain provisions which are prohibited.

C. The Company's Advertising and Promotional Literature Fall within Approved Federal and State Guidelines and Have Been Approved by New York's Department of State Prior to Use

1. Federal

OILSR regulations empower the Secretary of HUD to enjoin the use of advertising which is false and misleading or which differs materially from the information contained in the statement of record or property report (24 C.F.R. §1715.5[b][1973], 15 U.S.C. §1714[a]). No such action ever has been taken against defendants.

Advertising standards, included in the regulations to "alert developers to that type of advertising OILSR will consider as triggering the authority of the Secretary to seek injunctions or restraining orders" (Federal Register, Vol. 38, No. 170, Sept. 4, 1973, p. 23873), authorize advertising for the sale of land on an investment theme and for speculative purposes (24 C.F.R. §1715.15[f][1973]) as well as the exchange mechanism (claimed by the prosecution to be intrinsically fraudulent) utilized by defendants in their sale of Rio Rancho lots (24 C.F.R. §1715.15[z][1973]).

2. New York

New York's regulation of advertising and sales methods is much more comprehensive than the federal government's. Prior to use, each and every piece of advertising literature must be reviewed and approved by the Department of State.

19 N.Y.C.R.R. 135.17(a) prohibits the use of any advertising material "unless a copy * * * has first been accepted for filing and an advertising number (NYA--) assigned by the Department of State." And Regulation §135.17(e) provides as follows:

> "In reviewing the advertising or promotional material the Department of State will determine whether the same is in violation of Article 9-A of the Real Property Law and the applicable sections of this Part by examining form, language and content of the material, as supported by the record and other information available to it."* (Emphasis supplied.)

Since Article 9-A of the Real Property Law prohibits "any false * * * representation concerning any vacant land * * * offered for sale * * *" (Real Property Law, §338.5[b]), a determination by the Department of State after "examining form, language and content" that advertising is not "in violation of Article 9-A" surely is tantamount to approval, i.e., a finding, that the reviewed advertising contains no false representation.

Such findings by the Department have been made with respect to Company advertising and promotional brochures containing nearly every one of the alleged "fraudulent misrepresentations" concerning Albuquerque land values, the investment potential of Rio Rancho lots, the growth of Albuquerque, and its impact on Rio Rancho, and the availability of water as enumerated in Paragraphs 18(i), (j), (l), and (p) of the indictment. In

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* "Other information" refers to independent investigation by the Department, including periodic on-site inspections.

many instances the same quoted representation, presented for review to the Department of State in more than one piece of advertising, received State approval on more than one occasion.*

In addition to reviewing advertising and promotional material, the Department of State also requires submission along with the disclosure statement of "a full and complete description of the sales method or methods to be employed in the sale of any lot * * * of the subdivision" (19 N.Y.C.R.R. 135.13[a]).

The Department of State also requires that it be notified of an intended "sales meeting, reception, party or gathering" seven days in advance and the Department reviews notices and advertisements "which are used to call and advertise the meeting" (Official Compilation of Codes, Rules and Regulations, §135.13[c][8]).

Thus, in accordance with Regulation §135.13, the State was provided with a "full and complete description of the sales methods"--characterized in the indictment as an

*For example, the representation that "Land values in the vicinity of Albuquerque have consistently risen by an average of more than 25% per year since 1941--and may climb even faster" (Indictment, Paragraph 18[i], p. 18) was reviewed at least four times by the Department of State and promotional literature containing that statement was approved and assigned Numbers NYA 72-537, NYA822-19, NYA388-8, NYA 388-59.

It is also significant that the Department of State rejected other proposed advertising submitted to it as misleading or deserving of correction before assigning an "NYA--" number to it. Thus, as set forth in the affidavit of Edward B. Winslow, as early as 1963, Edward V. Alfieri, Assistant Counsel to the Department of State, rejected advertisements entitled "Land Investors Report" and "Reservation Form" because the advertising failed to make clear that the land being offered was not within the City of Albuquerque (see Exhibit F, annexed to Mr. Winslow's affidavit).

"elaborate high-pressure sales campaign" and charged as a principal means for carrying out the scheme to defraud--and notified in advance of every dinner party and investment seminar.

Again, on the basis of its close supervision over and review of sales methods and presentations, the Department of State approved as conforming with applicable rules and regulations the conduct of defendants' business practices.

ARGUMENT

PROSECUTION OF THE INDICTMENT WOULD VIOLATE DUE PROCESS, AND ACCORDINGLY, THE CHARGES MUST BE DISMISSED

Prosecution of criminal charges founded on conduct performed in reliance on official acceptance of that conduct as lawful is constitutionally barred as violative of due process. United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973); Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959). Cf. United States v. Laub, 385 U.S. 475 (1967). See also, United States v. Grier, 510 F.2d 570 (9th Cir. 1975); United States v. Timmins, 464 F.2d 385 (9th Cir. 1972).

As set forth above, the very conduct charged as criminal has been the subject of continuous and close review by

government agencies. That conduct has been accepted and approved and sales of Rio Rancho property have been permitted to continue. Defendants have rightfully relied on such action as official guidance that they were acting within the law.

Under such circumstances, the indictment must be dismissed because the due process clause prohibits its prosecution.

United States v. Pennsylvania Industrial Chemical Corp., supra, 411 U.S. 655, ("Picco") is particularly apposite. The defendant in that case was federally prosecuted for violating §13 of the Rivers and Harbors Act of 1899 because its industrial refuse had been discharged into a navigable river. It was the defendant's contention that the Army Corps of Engineers--the administrative agency responsible for enforcement of the 1899 Act--had continually advised it by regulation that refuse discharges which did not impede or obstruct navigation were not prohibited under the Act, and accordingly, it was affirmatively misled by the government into believing that its conduct was not criminal.

The trial court refused to permit PICCO to prove that it had relied on government assurance that its conduct was lawful. The Supreme Court held that ruling to be error and remanded the case to the trial court to permit PICCO to develop a record on "whether there was in fact reliance and, if so, whether that

reliance was reasonable" (id., 411 U.S., at 675). The Supreme Court left no question that if the defendant could establish such reliance, the prosecution of the charge would violate due process. Mr. Justice Brennan, for the Court, wrote as follows (id., at 674):

> "Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." (Emphasis supplied.)*

*In United States v. Insco, 496 F.2d 204 (5th Cir. 1974), the Fifth Circuit reversed a federal election law conviction because the defendant "lacked authoritative guidance" that his conduct was unlawful and thereby "was lulled into the reasonable impression that * * * his conduct did not run afoul of the federal [statute]" (id., 496 F.2d, at 209).

More compellingly than in Insco, supra, defendants in the instant case actually and justifiably relied on the continued permission from regulatory agencies to sell Rio Rancho land as "authoritative guidance" that their disclosures, advertising, and sales practices had been reviewed and found lawful.

Moreover, it is particularly unfair for the government to charge that defendants' disclosure statements were "ambiguous, incomplete, inaccurate, and incomprehensible." As described above (see pp. 14-17, supra), the language and form of these documents are virtually mandated by rules and regulations.

It is well established that there can be no prosecution for conduct which was, in effect, required by the government. See, e.g., People v. Markowitz, 18 N.Y. 2d 953, 223 N.E. 2d 572 (1966); People v. Donovan, 53 Misc. 2d 687, 279 N.Y. Supp. 2d 404 (Sp. Sess. Ct. West. Co. 1967); People v. Ferguson, 134 Cal. App. 41, 24 P. 2d 965 (1933); and see also, Note, Applying Estoppel Principles in Criminal Cases, 78 Yale L. J. 1046 (1969).

Raley v. Ohio, supra, 360 U.S. 423, and Cox v. Louisiana, supra, 379 U.S. 559, are also in point. In Raley, the Supreme Court held that the due process clause was violated by prosecuting witnesses for refusing to answer questions put to them by an investigative commission which had assured them that they had a privilege to refuse to answer. The Court reasoned as follows (id., 260 U.S., at 438):

> "* * * to sustain [the conviction] * * * would be to sanction the most indefensible sort of entrapment by the State--convicting a citizen for exercising a privilege which the State clearly had told him was available to him."

And in Cox, supra, the defendant's conviction for picketing "near a courthouse" was reversed because the defendant had relied on the advice of a local police official who permitted the picketing at the particular location later charged as unlawful. Echoing its decision in Raley, the Supreme Court wrote (id., 379 U.S. at 571):

> "The Due Process Clause does not permit convictions to be obtained under such circumstances."

Irrespective of whether conduct taken in vacuo can be said to be proscribed by law, it is simply unfair to prosecute where defendants have relied on the advice of government officials that

they were acting within the law.* That same unfairness obtains in the instant case. The years of close regulatory scrutiny over defendants' land sales business has resulted in continuous permission from the "watchdog" agencies to sell Rio Rancho land. In the face of the duty and power of these agencies to halt fraudulent sales, the continued permission to sell, after review and examination of disclosure statements, and in New York, after on-site inspections and approval of all advertising prior to use, was justifiably relied upon by defendants as authoritative guidance that they were conducting their business properly and lawfully.

Raley, Cox, and Picco call into sharp focus the elemental notion of due process that a person be given fair warning by the government of precisely what conduct it intends to punish. See, e.g., Wright v. Georgia, 373 U.S. 284, 293 (1963); In re Anastaplo, 366 U.S. 82, 94 (1961); Lambert v. California, 355 U.S. 225, 228 (1957).

* Compare, United States v. Mann, 517 F.2d 259 (5th Cir. 1975), petition for a writ of certiorari filed Oct. 24, 1975, 44 U.S.L.W. 3334 (Dec. 2, 1975), in which the Fifth Circuit reversed an order dismissing an indictment because there was no evidence that the government acted in such a way as to mislead or assure defendants that punishment would not attach (id., 517 F.2d, at 270).

And in United States v. Kiger, 297 F. Supp. 339 (S.D.N.Y. 1969), aff'd, 421 F.2d 1396 (2d. Cir.), cert. denied, 398 U.S. 904 (1970), Judge van Pelt Bryan of this Court, recognized that it would be a bar to prosecution if a defendant was "misled into believing that [his] conduct was not in violation of law * * *" (id., 297 F. Supp., at 342), but found no such evidence

Significantly, in both Mann, supra, and Kiger, supra, the Courts were careful to point out that mere government silence is not equivalent to proof of official misleading. Here, for 14 years defendants were affirmatively led by the government to believe that their actions were lawful.

Here, the defendants relied upon the actions of government agencies charged with the duty of examining, reviewing and passing their official judgments upon conduct which the government now alleges violated federal law.

Reliance by defendants in this case was not placed in a low-level government functionary as the Supreme Court held sufficient to bar a prosecution in Cox, but rather in the responsible administrative agencies to which citizens "may properly resort for guidance" as to the scope of the law. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also Udall v. Tallman, 380 U.S. 1 (1965).

It was under the same circumstances as present here that the Supreme Court in Picco, supra, 411 U.S. 655, stated that there could be "no doubt that traditional notions of fairness * * * prevent the Government from proceeding with the prosecution" (id., 411 U.S. at 674).

It follows that the indictment must be dismissed.

POINT II

THERE IS SUBSTANTIAL EVIDENCE TO WARRANT THIS COURT'S EXAMINATION OF THE GRAND JURY MINUTES TO DETERMINE WHETHER THE GOVERNMENT MISLED THE GRAND JURY AND VIOLATED DUE PROCESS BY FAILING TO INFORM IT OF THE EXISTENCE OF EXCULPATORY EVIDENCE AND ITS LEGAL SIGNIFICANCE AS AN ABSOLUTE DEFENSE

In the course of the 20-month grand jury investigation which concluded in the instant indictment, certain exculpatory evidence which constitutes an absolute defense to the charges was revealed to the prosecutor on numerous occasions. Aside from abundant indication that this evidence was without reason cast aside and rejected by the prosecution, there is firm indication from the face of the indictment that the grand jury was wrongly instructed or not instructed at all by the prosecutor as to the legal significance of certain of this exculpatory evidence.

In United States v. Ramirez, 482 F. 2d 807 (2d Cir.), cert. denied sub nom. Gomez v. United States, 414 U.S. 1070 (1973), where the grand jury was misled as to the hearsay nature of evidence presented to it, the Second Circuit established that in this Circuit a defendant's claim of the government misleading a grand jury required, "upon appropriate motion," an in-camera review of the grand jury minutes by the trial court. The Court wrote (id., 482 F. 2d, at 812):

> "* * * the proper course for the trial judge to follow is to examine the grand jury minutes in camera [footnote omitted] to determine whether or not the grand jury was misled * * *."*

Necessarily, because of the secretive nature of grand jury proceedings, it cannot be claimed with certainty that the prosecution failed to disclose the existence of all exculpatory evidence to the grand jury. Nor can it be claimed that the grand jury was improperly instructed with respect to every aspect of this case. Yet, based upon debriefings of a key grand jury witness and others questioned by the government but never called before the grand jury, and allegations in the indictment itself that purport to state the law on an important defense theory, it is evident that the prosecution failed to properly instruct the grand jury and failed to adduce or alert the grand jury to the existence of exculpatory evidence.

A. Exculpatory Evidence

As the affidavit of Mark S. Arisohn sets forth, Leonard Geller was the principal salesperson for the corporate

This motion does not seek disclosure of the grand jury minutes, but rather an in camera inspection of those minutes by the Court. However, this Court has held it appropriate for defe counsel to be given access to grand jury minutes because " * * defendants are in the best position * * *" and the court does n have "the time" to resolve constitutional infirmities in a gran jury presentation. United States v. Dornau, 356 F.Supp. 1091, (S.D.N.Y. 1973).

defendants in the New York region. To a large extent, it was Geller who conceived of and executed the sales practices in the metropolitan area. Under a prosecutorial promise of immunity, Geller spoke to the prosecution on many occasions and became a grand jury witness.

During the course of his interviews with the prosecution, Geller disclosed to the government the following circumstances bearing directly on the lack of merit of the central charges of fraud alleged in the indictment:

1. there was never any Company authorization for sales personnel to represent that lots at Rio Rancho would have any resale value within the foreseeable future;

2. Geller believed that the representations made in the Company's literature and films had been approved by the State of New York;

3. Geller believed that the purchase of Rio Rancho lots was in fact a safe and secure financial investment, that the growth of the Albuquerque area would have an impact on land values at Rio Rancho, and that defendants honestly held those same opinions;

4. Geller believed that many purchasers bought Rio Rancho property to relocate and disagreed with the

prosecution that the "overwhelming majority" of purchasers bought the lots as an investment; and

5. Geller believed that on the basis of sales rate, the property would eventually be sold out, that there would be a secondary market for the property, and that the Company would continue to develop the property because of the profit to be made through sale of homes.

Defense counsel have been informed by Geller that the prosecution refused to permit him to testify to these matters before the grand jury, rejected them to his face as "company bullshit," and threatened him with "prosecution, conviction and jail" if he persisted in his expression of these circumstances.

Even more shocking, if true, is the prosecution's rejection of and refusal to alert the grand jury to existence of evidence that New York State continually approved Company literature, advertising, and sales practices for the 14 year period covered by the indictment. As the affidavit of Stanley S. Arkin sets forth, the prosecution interviewed but failed to call as a grand jury witness a senior attorney with New York's Department of State, who told the government that certain advertising referred to by the prosecutrix as prima facie fraudulent was in fact approved by him and that the manner in which the Company did business was

permitted by the New York Department of State.

Additionally, customers of the Company were solicited by the prosecution to complete and return to it a questionnaire (Exhibits A-1 to A-3 annexed to the affidavit of Stanley Arkin). It is not too much to suggest that a portion of the responses must have been exculpatory to defendants. The prosecution's reaction in the face of other exculpatory evidence raises the inference that this exculpatory evidence was similarly disregarded and not revealed to the grand jury.

2. Instruction to the Grand Jury

Paragraphs 18(g)(xix) and (xxiv) of the indictment allege, inter alia, that the review by the New York Department of State of the New York State Offering Statement and the filing of advertising and promotional material with the Department of State:

> "did not, as the defendants and co-schemers well knew, constitute approval or verification * * * that the statements contained in [the reports, advertising and promotional material] were true, reasonably complete, and not misleading or fraudulent * * *."

To be sure, New York law prohibits the making of representations that the State has in any way "approved" or "passed upon the merits" of the sale of Rio Rancho lots

(see, New York Real Property Law, §337-b.5). The clear intent of such provisions is to prevent sales based on representations of approval of the product. No statutory or regulatory provision prohibits a representation that review of disclosure statements and advertising by New York constitutes approval and verification of the statements and advertising.

The erroneous statement of law appearing on the face of the indictment graphically demonstrates that the grand jury was either improperly instructed or not instructed at all on an issue known* by the prosecution to be one of defendants' major defense theories: their good faith reliance on governmental regulation and approval of their advertising, disclosure statements and sales practices.

Contrary to the indictment's assertion, the law is clear that review and acceptance of disclosure statements and advertising by New York State does constitute

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* In August, 1975, a 79-page printed brief was addressed to the then United States Attorney, Paul J. Curran, in which it was made clear that a factor which overwhelmingly established good faith as an absolute defense to a criminal fraud charge was the careful regulation and approval by governmental agencies of defendants' advertising, promotional material and disclosure statement.

approval and verification of contents.*

Reliance on government regulation, review and approval of advertising and sales practices constitutes an absolute defense to charges of criminal fraud. See, e.g.,

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* The following excerpts from Part 135 of the Official Compilation of Codes, Rules and Regulations of New York establish such approval (19 N.Y.C.R.R.):

> "135.11 Approval. No subdivider shall sell or offer for sale or otherwise undertake to do any act coming within the purview of article 9-A of the Real Property Law unless the Department of State shall first have accepted for filing the statement provided for in section 337-a of article 9-A of the Real Property Law***.
>
> "135.17 Advertising. (a) No offer to sell *** subdivided lands by means of advertisements *** shall be made unless a copy of such advertisement*** has first been accepted for filing and an advertising number (N.Y.A.___) assigned by the Department of State.***
>
> "(e) In reviewing the advertising or promotional material the Department of State will determine whether the same is in violation of article 9-A of the Real Property Law and the applicable sections of this Part by examining form, language and content of the material, as supported by the record and other information available to it."

Since Article 9-A of the Real Property Law prohibits "any false * * * representation concerning any vacant land * * offered for sale * * *" (Real Property Law, §338.5[b]), a determination by the Department of State that advertising is not "in violation of Article 9-A" surely is tantamount to approval, and indeed, a finding that the reviewed advertising contains no false representation. Such finding is based upon on-site inspections by the Department which have been made repeatedly over the years.

United States v. Diamond, 430 F. 2d 688 (5th Cir. 1970); United States v. Brandt, 196 F. 2d 653, 657 (2d Cir. 1952); United States v. Littlejohn, 96 F. 2d 368 (7th Cir.), cert. denied, 304 U.S. 583 (1938).

The government's active misleading of the grand jury with respect to the existence of evidence favorable to defendants and the law bearing directly on an absolute defense to the charges ultimately voted prevented the grand jury from properly and effectively exercising its fundamental role and denied defendants due process of law.

The grand jury, an institution deeply rooted in Anglo-American history, has traditionally served to shield and protect against arbitrary, oppressive, and over-zealous prosecution.

The Supreme Court, in Wood v. Georgia, 370 U.S. 375, 390 (1962), capsulized that role in the following language:

> "Historically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused * * * to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

To meaningfully act as the "'bulwark' between prosecution and citizen" (Kaufman, "The Grand Jury - Its

Role and Its Powers, 17 F.R.D. 331, 335), the grand jury must be able to "compel the production of evidence or the testimony of witnesses as it considers appropriate * * *." (Emphasis supplied.) United States v. Calandra, 414 U.S. 338, 343 (1974). As the Second Circuit wrote in United States v. Stone, 429 F. 2d 138, 140 (2d Cir. 1970):

> "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined * * *." (Emphasis supplied.)

The "substantial right" to have the grand jury make the charge on its own judgment (Stirone v. United States, 361 U.S. 212, 217 [1960]), necessarily implies an affirmative obligation on the part of the prosecutor to inform the grand jury that exculpatory evidence is "available" so that it can "compel" production "as it considers appropriate." Moreover, where exculpatory evidence is produced, the grand jury must be properly instructed as to its legal significance or the effect is no different than when such evidence is concealed. See, e.g., United States v. DeMarco, 401 F.Supp. 505, 513-4 (C.D. Cal. 1975); Johnson v. Superior Court, ___ Cal. 3d ___, 18 Cr. L. R. 2074 (Sup. Ct. Cal. Sept. 9, 1975); People v. Ferrara, 370 N.Y. Supp. 2d 356 (Nas. Co. Ct. 1975); People v. Seward, 51 Misc. 2d 415, 273 N.Y. Supp. 2d 306 (Rock. Co. Ct. 1947); People v. Santoro, 63 N.Y.

Supp. 2d 615 (Kings Co. Ct. 1946); ABA Standards, The Prosecution Function, §3.6(b) (1971).*

A grand jury, as in the case at bar, which is misled as to both the existence of exculpatory evidence known by the government to be available and the legal significance of exculpatory evidence before it is precluded from exercising its "independent and informed" (Wood v. Georgia, supra, 370 U.S. 375, 390) judgment as to whether the critical step of indictment should be taken.

Such active misleading of the grand jury by the government has been sternly condemned by the courts and held to vitiate resulting indictments as violative of due process. United States v. Estepa, 471 F. 2d 1132 (2d Cir. 1972); United States v. Basurto, 497 F. 2d 181 (9th Cir. 1974); United States v. DeMarco, supra, 401 F.Supp. 505; United States v. Gallo, 394 F. Supp. 310 (D. Conn.

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* ABA Standards, The Prosecution Function, §3.6(b) (1971) provides:

> "The prosecutor should disclose to the grand jury evidence which he knows will tend to negate guilt."

1975); and cf. United States v. Leibowitz, 420 F. 2d 39, 42 (2d Cir. 1969).

In United States v. Estepa, supra, 471 F. 2d 1132, the Second Circuit dismissed an indictment because the government misled the grand jury to believe that hearsay evidence it had received was an eyewitness account, thereby "deceiv[ing] the grand jur[y] as to 'the shoddy merchandise they [were] getting [depriving them of an opportunity to] seek something better if they wish[ed].'" (Id., 471 F. 2d at 1137.) (Emphasis supplied.)

And in a similar vein, the Ninth Circuit, in United States v. Basurto, supra, 497 F. 2d 781, held that "the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment" returned by a grand jury kept ignorant by the government of the fact that "testimony before [it] was perjured" (id., 497 F. 2d, at 785-786).*

United States v. DeMarco, supra, 401 F.Supp. 505, is also particularly apposite.

*The Basurto Court made it clear, moreover, that the government's violation of defendant's due process rights which "parallel[ed]" the violation denounced by the Supreme Court in Giles v. Maryland, 386 U.S. 66 (1967), and Napue v. Illinois, 360 U.S. 264 (1959), transcended the "established rule" that when a duly constituted [Footnote Continued]

In that case the government obtained an indictment in the Central District of California charging DeMarco with making false statements to a special agent of the Internal Revenue Service (18 U.S.C.§1001). The federal grand jury in California which returned the indictment was not informed by the prosecutors that DeMarco had previously been threatened by the government with prosecution on that very indictment "in an effort to prevent [DeMarco] from asserting his statutory venue rights" with respect to an indictment returned against him in the District of Columbia (id. 401 F.Supp., at 508).

The Court granted DeMarco's motion to dismiss the California indictment because "* * * the failure of the prosecutor to inform the grand jury of the relevant facts preceding the initiation of the decision to charge the defendan[t] * * * violate[d] the defendant's right to an 'independent

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[Footnote continued]
grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision. Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956)." (Id., 497 F. 2d, at 785). Cf. United States v. Dornau, 356 F.Supp. 1091, 1099-1100 (S.D.N.Y. 1973).

The violation of due process resulting from the government's failure to disclose the "use [of] false evidence" (Napue v. Illinois, supra, 360 U.S. 264, 269), relied upon in Basurto, supra, is indistinguishable for purposes of the analysis herein from the due process violation resulting from "the suppression by the prosecution of evidence favorable to an accused" (Brady v. Maryland, 373 U.S. 83, 87 [1963]). In both instances the grand jury is deceived by the government's conduct and deprived of an opportunity to "seek something better if they wish[ed]." United States v. Estepa, supra, 471 F. 2d 1132, 1137.

and informed grand jury' [citation omitted] and * * * seriously undermine[d] the proper function of the grand jury in our system of criminal justice" (id., at 507). In language applicable to the instant case, the Court in DeMarco wrote as follows (id., at 513-14):

> "* * * the prosecutor did not disclose to the grand jury that the charge could be attacked as an unjustifiable exercise of the charging power. The grand jury was entitled to be apprised of that information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances.
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> * * *
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> "If a defendant can appropriately resist prosecution at trial on the ground that the prosecution has launched an indictment for unjustifiable purposes, it makes sense to permit the grand jury to prevent the indictment from being filed in the first place. * * * Thus if the grand jury's function to stand between the accuser and the accused is to be safeguarded, it is necessary to impose a duty upon the government to reveal to the grand jury information bearing on colorable claims that its motives are suspect.
>
> * * *
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> "In this case, the government did not present information vital to the grand jury's informed and independent judgment." (Emphasis supplied.)*

* Unlike Jack v. United States, 409 F.2d 522, 524 (9th Cir. 1969) and Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968), where it was held not to be fatal error for the government to withhold evidence from the grand jury tending only to "undermine the credibility of the witnesses appearing before that body," (Loraine, supra, at 339), in the instant case exculpatory evidence going to the very heart of the prosecution's theories -- "information vital to the grand jury's informed and independent judgment" (DeMarco, supra, at 514) -- was suppressed.

For the grand jury in the instant case to have truly and meaningfully acted as the "bulwark" between prosecutor and citizen rather than an uninvolved and uninformed rubber stamp for the government, it should have been alerted to the existence of exculpatory evidence, and it should have been properly and fully instructed on the law relating to an absolute defense to the charges it voted. Most certainly had the grand jury, assuming it to have acted independently, been informed that reliance on government regulation and approval amounted to an absolute defense, there is a reasonable likelihood it would have voted a "no bill." Instead, the prosecution, in a perhaps overzealous pursuit of an indictment, chose to disregard, indeed, ignore that phase of the case and ride rough shod over the fact that defendants had submitted voluntarily to stern and thorough government review of all of their day-to-day business conduct. As the Court said in DeMarco, supra, "[t]he grand jury was entitled to be apprised of that information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances."

The failure of the prosecution to take such steps amounts to a due process violation and resulted in seriously misleading the grand jury. The indictment must be dismissed.

POINT III

THE INDICTMENT SHOULD BE DISMISSED FOR VAGUENESS

The indictment is vague and fails to allege any particular misconduct at any particular time, and, accordingly, fails to sufficiently apprise the defendants of specifically what they must be prepared to meet. The most egregious and obvious example of the structural failure in the indictment is its oft repeated allegation that the "overwhelming majority"* of the defendants' 45,000 customers who were misled over a 14 year period to purchase 77,000 lots. Nowhere is there an allegation that a particular customer was misled at a particular time. Nor does the indictment ever characterize or delimit in any way except by the pejorative, inflammatory phrase, "persons to be defrauded", just who are the "overwhelming majority". Not even the approximate percentage of customers in this alleged category is pleaded.

Additionally, the indictment (Paragraphs 14, 15, and 16, pp. 3-5) utilizes a series of vague and indefinite adjectives, and adverbs, such as "safe," "sound," and "secure" in an apparent effort to set forth the alleged false representations and scope of the scheme, which results in blurry

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* This amorphous class is referred to throughout the indictment as "the persons to be defrauded."

meaningless generality instead of the precision required by the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure.

The indictment must be dismissed because its broad, loose, and vague allegations fail to adequately apprise defendants of the exact charge they should prepare to meet and, in effect, permit the government to first specifically shape the charges at trial to fit its own evidence and account for any defense evidence.

The fundamental test of sufficiency for an indictment is whether it adequately informs the defendant of the precise conduct claimed by the government to amount to a crime. Russell v. United States, 369 U.S. 749, 763-764 (1962); United States v. Debrow, 346 U.S. 374, 376 (1953); Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Simmons, 96 U.S. 360, 362 (1877); United States V. Cruikshank, 92 U.S. 542 (1876); United States v. Seeger, 303 F.2d 478 (2d Cir, 1962); United States v. Lamont, 18 F.R.D. 27 (S.D.N.Y. 1955), aff'd, 236 F.2d 312 (2d Cir. 1956); Sixth Amendment to the United States Constitution; Rule 7(c) of the Federal Rules of Criminal Procedure.

The Supreme Court succinctly phrased this requirement in Ledbetter v. United States, 170 U.S. 606, 610 (1898), as follows:

> "[E]very ingredient *** must be clearly and accurately set forth, and *** the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged***."

Similarly, in Russell v. United States, supra, 369 U.S. 749, the Supreme Court said that the failure of an indictment to adequately specify the factual elements of a crime charged unfairly:

> "*** left the prosecution free to roam at large--to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial ***." (Id., 369 U.S., at 768.)

In the instant case, the prosecutor, given the untoward benefit of going to trial on the present indictment, would be "free to roam at large" through 14 years of conduct of an ongoing business enterprise, 45,000 sales of 77,000 lots by a large number of salesmen. When confronted by one or thousands or tens of thousands of non-fraudulent sales the prosecutrix will be able to "shift [her] theory of criminality" to discount what might be fatal gaps in the proof if the charges were properly framed.

As Judge Frankel wrote in dismissing an indictment for vagueness in United States v. Agone, 302 F. Supp. 1258, 1260-1261 (S.D.N.Y. 1969):

> "Where *** the class of possible victims has a substantial membership, an indictment like the one in question becomes excessively

> and prejudicially uncertain. [Citations omitted.]
>
> * * *
>
> "It has left the prosecution free to fill in this vital missing element--free, in a way which is constitutionally grave *** to name someone different from the one intended by the grand jury."

See also, United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970); and compare United States v. Rizzo, 373 F. Supp. 204 (S.D.N.Y. 1973), aff'd, 493 F.2d 1399 (2d Cir. 1974), cert. denied, 417 U.S. 944 (197), and cf. DeBremaecker v. Short, 433 F.2d 733 (5th Cir. 1970).

To be sure, the prosecutor need not allege the name of every intended victim of a scheme to defraud. But where the intended object of the scheme is a class of victims, that class must be defined with certainty. Otherwise, as in Agone, the prosecution on the trial of the instant case would be left "free, in a way which is constitutionally grave*** to name [a class] different from the one intended by the grand jury."

One needs little imagination to foresee the "defendants' nightmare" projected by the charge that the "overwhelming majority" of customers were misled. All satisfied Rio Rancho customers--those who say they were not misled--could conceivably be banned from testifying on the prosecutor's representation that they fall within the minority and their testimony is

thus not relevant. Based on the present charge, defendants have no way of knowing who it is claimed was intended to be defrauded, and, accordingly, no way of preparing to defend against that charge.

The indictment is also vague with respect to the central element of the charges at bar. The alleged misrepresentations claimed to be false and omissions claimed to be material, are charged in subjective language of no fixed meaning.

The core of the alleged fraud is that defendants falsely represented in their advertising and promotional literature that the purchase of lots in Rio Rancho were "safe and secure financial investments which would appreciate rapidly and greatly in market value and could be resold at a substantial profit" (indictment, Paragraph 14, pp. 3-4). The terms "safe," "sound," "secure," "rapidly," "greatly," and "substantial" all form part of the charged falsity; yet each term is ambiguous, capable of only relative interpretation.

Other alleged false representations suffer from the same flaw: a "unique" investment opportunity; "directly" in the path; "bursting at the seams"; "scarce" building land; "brisk" resale market; "easily" resalable; "sound, virtually risk free" financial investment (indictment, Paragraph 15, p. 4).

Significantly, too, these words used in the indictment are an amalgam of many pieces of literature and oral presenta-

tions excerpted and subjectively interpreted most artfully by the prosecution (see, e.g., Paragraphs 18[i], [j], [l] and [p]. The vice in charging such statments as false is that defendants are not apprised with certainty of the government claim. See, e.g., United States v. Zeehandelaar, 498 F.2d 352, 356 (2d Cir. 1974).

United States v. Lattimore, 127 F. Supp. 405 (D.D.C. 1955), aff'd per curiam, 232 F.2d 334 (D.C. Cir. 1955) (en banc), is illustrative. In that case the court dismissed a perjury indictment charging that defendant testified falsely when he denied being a "follower of the Communist line." The court reasoned that because the quoted phrase had "no universally accepted definition" (id., 127 F. Supp., at 409) the indictment failed to contain the necessary degree of specificity and amounted to "ask[ing] the jury to aspire to levels of insight to which the ordinary person is incapable, and upon such speculation no criminal indictment should hinge. [Footnote omitted.]" (Id., 127 F. Supp. at 410.) In language relevant here, the court wrote as follows (Id., at 410-411):

> "When elements in an indictment are so easily subject to divergent interpretation, the accused is not adequately apprised of the charges as to enable him to prepare a defense [footnote omitted]. It therefore fails to conform to the requirements of the Sixth Amendment and Federal Rules [footnote omitted]. It cannot be cured by a bill of particulars [footnote omitted]."

See also, United States v. Lattimore, 215 F.2d 847 (D. C. Cir. 1954).

Assuming government proof, for example, that defendants in this case represented their opinion that the purchase of Rio Rancho lots was a "safe and secure" financial investment, the jury would be asked, as in Lattimore, to speculate: first, what interpretation defendants intended when making the representation and second, what interpretation purchasers understood by the words when relying on them. The jury also would have to supply its own interpretation of the words in attempting to decide whether defendants falsely represented their opinion.

As the court ruled in Lattimore, supra, 127 F. Supp. 405, 410, this is the kind of speculation upon which "no criminal indictment should hinge."

It follows that the indictment should be dismissed.

POINT IV

VAGUE AND OPEN-ENDED CHARGES, INFLAMMATORY AND IRRELEVANT SURPLUSAGE, AND ALLEGATIONS INCAPABLE OF PROOF MUST BE STRICKEN FROM THE INDICTMENT

The indictment contains three types of prejudicial surplusage which must be stricken pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure:*

A. all-inclusive phrases which may permit the government at trial to expand its proof to issues beyond the charges considered by the grand jury;

B. inflammatory, irrelevant and argumentative allegations which are not essential to plead the crimes charged and which may mislead the jury; and

C. allegations which are incapable of proof.

A. The All-Inclusive, Non-Specific Phrases Contained in Paragraphs 15 And 16 of the Indictment Must Be Stricken

Aside from pleading enumerated misrepresentations in non-specific language, the charging paagraphs of the indictment (paragraphs 15 and 16) contain all-inclusive phrases indirectly alluding to the existence of additional misrepre-

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* Rule 7(d) of the Federal rules of Criminal Procedure provides that "[t]he Court on motion of the defendant may strike surplusage from the indictment * * *."

sentations not pleaded at all. Thus, Paragraph 15 alleges that defendants utilized "a variety of false * * * representations" including "among other things" those listed. In a like manner, Paragraph 16 charges defendants with concealing specified information "among many other relevant facts."

These open ended charges fail absolutely to apprise defendants of the nature of the allegations against them and must be stricken because they would impermissibly allow the government to expand upon whatever charges may have been found by the grand jury.

In United States v. Pope, 189 F. Supp. 12, (S.D. N.Y. 1960), Judge Weinfeld granted the defendant's motion to strike words from the charging paragraph of an indictment identical to those in the instant indictment and wrote (id., 189 F. Supp., at 26):

> "A specific charge made by the grand jury may itself fail for lack of proof and yet, if the prosecution may augment the charges under the all-inclusive 'among other things,' the defendants may finally be prosecuted and convicted on charges of falsity in the statements not considered by the grand jury, or if considered, may have been rejected by it."
>
> See also, Marsh v. United states, 344 F.2d 317 (5th Cir. 1965).

Unlike United States v. Mayo, 230 F. Supp. 85 (S.D. N.Y. 1964), where similar all-inclusive words were

contained in the means paragraphs of an indictment (as they are throughout Paragraph 18--the means paragraph of the instant indictment), Paragraph 15 and 16 of the indictment here, as in Pope, supra, charge an essential element of the crime--i.e., the alleged false representations.*

Accordingly, the words "a variety of false * * * representations," "among other things," and "among many other relevant facts" should be stricken from paragraphs 15 and 16 of the indictment.

B. Paragraph 18(g) Must Be Redacted to Eliminate Erroneous Statements of Law, Allegations Alluding to the Commission by Defendants of Crimes Not Charged, and Inflammatory Allegations Which Are Collateral to the Charges And May Thus Mislead the Jury

Paragraph 18(g) of the indictment, labeled "THE SELLING TECHNIQUES," consisting of 29 subparagraphs spread over 11 pages, seeks by its imprecise and inflammatory rhetoric to characterize the defendants' sales program as "an elaborate high-pressure sales campaign." These paragraphs of the indictment bristle with irrelevant and unnecessarily prejudicial allegations, argumentative and

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* In United States v. Caine, 441 F.2d 454 (2d Cir. 1971), cert. denied, 404 U.S. 827 (1971), the Second Circuit was asked to apply the holding of United States v. Pope, supra, 189 F. Supp. 12, to a paragraph of a mail fraud indictment similar to Paragraphs 15 and 16 of the indictment in this case. The Court decided Caine, however, on other grounds.

repetitious assertions, incorrect statements of law, and insinuations that other crimes uncharged in the indictment were committed by defendants. The particular vice in this series of allegations is compounded by their being combined and mingled with paragraphs alleging misrepresentations (e.g., Paragraph 18[g][vi]), which circumstance can only serve to confuse and mislead the jury.

Accordingly it is submitted that Paragraph 18(g) should be redacted by striking these objectionable allegations from the indictment pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure.

1. Erroneous Statements of Law and Allegations Relating to the Commission of Uncharged Crimes

Paragraphs 18(g)(xix), (xx), (xxi), (xxiii), (xxiv), and (xxv) contain an extremely objectionable type of surplusage: incorrect statements of law and oblique references to the commission of crimes not charged in the indictment. In Paragraph 18(g)(xix), it is alleged that the review by government offices of the Federal Property Report and New York Offering Statement "did not * * * constitute approval or verification by the government offices that the statements contained in these Reports were true, reasonably complete, and not misleading or fraudulent," and that as the defendants "well knew" it is a crime to represent the opposite.

Paragraph 18(g)(xxiv) makes identical allegations about the effect of filing advertising, promotional films, and literature with the State of New York and also states that as defendants well knew, representations of State approval was a crime. Paragraph 18(g)(xxv) actually asserts that defendants committed that crime although not formally charged.

Similarly paragraphs 18(g)(xx), (xxi), and (xxiii) charge that defendants caused their disclosure statements to be withheld and hidden from purchasers and the information in them to be "ambiguous, incomplete, inaccurate, and misleading." Again, although not charged in the indictment as separate offenses, those allegations suggest violations of federal law (see, 15 U.S.C. §§1703[a][1], [a][2][B], 1717) and create the dangerous possibility that defendants will be convicted of some crime but not the crime with which they have been charged.

The suggestion that defendants may have commited other crimes not charged is fundamentally unfair and must be stricken. See, United States v. Verra, 203 F. Supp. 87 (S.D.N.Y. 1962); United Sates v. Bonanno, 177 F. Supp. 106, 116 (S.D.N.Y. 1959); United States v. Saporta, 270 F. Supp. 183, 186 (E.D.N.Y. 1967).

In United States v. Verra, supra, 203 F.Supp. 87, this Court ordered that a series of allegations in

an indictment relating to the defendant's commission of other crimes be stricken. Judge Weinfeld wrote (id., 203 F.Supp., at 90):

> "While it is true that surplusage in an indictment may be disregarded, [footnote omitted] the inclusion of the questioned allegations serves no purpose other than possible prejudice to the defendants. [Footnote omitted.] (Emphasis supplied.)

Aside from alluding to the commission of uncharged crimes, the allegations contained in Paragraphs 18(g)(xix) and (xxiv) are simply false statements of law. Contrary to the charge, the review and examination of disclosure statements and advertising by New York's Department of State does constitute approval of the contents of the documents, and it is not a crime to so represent (see, N.Y. Real Property Law, §338.5[b]; 19 N.Y.C.R.R. §§135.00 135.17[a] and [e]).*

These allegations, too, must be stricken.

2. Inflammatory Allegations Relating to "High Pressure Sales" and Argumentative Assertions Regarding Motives

Paragraph 18(g) is full of allegations which detail ad nauseum claimed improprieties in defendants'

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* For an analysis of these sections, see this brief, Point I, p. 19 and Point II, p. 33).

selling techniques.* Each of these allegations is calculated to inflame a jury of consumers, but none is essential to pleading the crimes charged. Under such circumstances, these allegations must be stricken. United States v. Verra, 203 F. Supp. 87, 90 (S.D.N.Y. 1962); cf.

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* The following are illustrative:

1. The sales presentations "were designed to induce the persons to be defrauded to sign contracts (Paragraph 18[g][i], p. 8);

2. The sales presentations were designed "to exploit any lack of financial sophistication and knowledge on the part of the persons to be defrauded" (Paragraph 18[g][ii], p. 8);

3. The defendants employed salesmen "who were compensated solely on a commission basis" (Paragraph 18[g][viii], p. 9);

4. The defendants trained their salesmen "to maximize immediate 'impulse' sales" (Paragraph 18[g][viii], p. 10);

5. The defendants trained their salesmen to "discourag[e] and prevent[ ] the persons to be defrauded from consulting with lawyers or knowledgable financial advisors prior to signing contracts" (Paragraph 18[g][viii], p. 10);

6. The defendants caused their salesmen to "loudly and conspicuously * * * call 'holds' on particular lots" (Paragraph 18[g][xi], p. 11);

7. The defendants "operate[d] carefully controlled and supervised tours" (Paragraph 18[g][xvi], p. 12);

8. The defendants "carefully supervis[ed] and controll[ed] the movements and activities of the persons on these tours" (Paragraph 18[g][xvi], p. 13);

United States v. Monroe, 164 F.2d 471, 476 (2d Cir. 1947), cert. denied, 333 U.S. 828 (1948); Beck v. United States, 33 F. 2d 107 (8th Cir. 1929); United States v. Curtis, 506 F. 2d 985 (10th Cir. 1974).

In Beck v. United States, supra, the mail fraud indictment charged a scheme to defraud relating to defendant's home construction business and claimed that the defendant had falsely represented that he could build cheaper houses than were otherwise available and that he could do so with smaller down payments than were generally required. The indictment included allegations that defendant's corporation spent too much money and that the "corporation maintained elaborate and luxuriantly furnished offices" (id., 33 F.2d at 110).

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fn. con'd.)

9. The defendants utilized a movie as part of their sales presentation "without informing the persons to be defrauded that the movie had been produced and in large part paid for by AMREP and Rio Rancho, and that prior to its use at sales dinners the movie had been significantly edited by defendants" (Paragraph 18[g][xvii], p. 13);

10. The defendants caused "their sales dinner presentations to be organized in such a way as to carefully synchronize the use of written materials, movies, podium speeches and individual salesmen, who were strategically located at each table and assigned to small groups of potential purchasers" (Paragraph 18[g][xviii], p. 13);

11. The defendants "caused salesmen to be trained to discourage anyone who noticed the Reports from reading them, and to give the Reports to the persons to be defrauded * * * concealed amongst promotional brochures" (Paragraph 18[g][xx], p. 14);

The Eighth Circuit reversed the conviction specifically noting that "[t]he surplusage in the * * * indictment is collateral to the charges * * *, and may have misled." (Id.)

The danger of permitting the inflammatory allegations to remain in the instant indictment is that the jury might very well be "misled" into convicting defendants of a crime which was not charged and does not exist: i.e., engaging in elaborate high pressure sales practices.

In an effort to anticipate the defense that in 1972 defendants substantially modified their advertising voluntarily to place more emphasis on the development of a residential community at Rio Rancho Estates rather than purchase as an economic investment, paragraph 18(g)(xxvi) of the indictment charges in conclusory and argumentative fashion that defendants, out of "fear", "review[ed] and revise[d] their advertising matrials * * * so as to shade and qualify" the investment representations "without, at

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(fn. con'd.)

12. The defendants "cause[d] the sales dinner presentations to be timed and planned in such a way as to make it virtually impossible for the persons to be defrauded to read and understand the contents of the purchase contracts" (Paragraph 18[g][xxii], p. 15); and

13. The defendants caused "their salesmen to prevent potential customers from removing any" material from the room (Paragraph 18[g][xxiii], p. 15).

the same time weakening the real impact of these [representations] * * *." The indictment thus alleges as fact the prosecution's opinions as to defendants' motive for changing advertising literature, i.e., "fear", and the impact and effect of such changes, i.e., only a "shad[ing] and qualify[ing]." These argumentative allegations, pleaded in summation type rhetoric, must be stricken. See, United States v. Long, 118 F. Supp. 857, 860 (D.P.R. 1954), in which the Court granted a motion to strike allegations from an indictment which asserted the prosecution's conclusions as to the motives of the defendant.

C. The Allegations in the Indictment Which Charge as Fraudulent Representations Predictions of Future Events Must Be Stricken Because Such Allegations Are Incapable of Proof at the Present Time

The gravamen of the indictment is that persons were misled into buying Rio Rancho land by defendants' false representations of their opinion as to its future worth. These allegations which base their claim of falsity on the government's prediction that some future event will or will not occur require speculation by the jury as to the future and are not susceptible to proof at the present time.

Allegations of predictions which by their very nature are no presently provable as either true

or false, must be stricken. (Cf., e.g., Conley v. Gibson, 355 U.S. 41, 45-46 [1957], where the Supreme Court reiterated the fundamental rule that a civil complaint is dismissible for failure to state a claim "* * * unless it appears beyond doubt that the plaintiff can prove [a] * * * set of facts in support of his claim which would entitle him to relief.")

Stripped of strident and excess verbiage, the core of the charge appears to be that most persons purchased lots at Rio Rancho in reliance on the allegedly false representation that such purchases were "safe and secure financial investments which would appreciate rapidly and greatly in market value and could be resold at a substantial profit." (See e.g., Paragraphs 14, 16, 15[h], [i], [j], [k], [l], and [m]).

The representation the government claims was made by defendants--that the purchase of Rio Rancho land is a "safe," "secure," or "sound investment"--is clearly not an explicit representation of any existing fact which can be labeled "true" or "false," but rather a statement of opinion or prediction concerning the present and future value of Rio Rancho land, i.e., that the present value of Rio Rancho land will increase in the future.

To be sure, a statement of opinion as to the future may theoretically serve as the basis of a criminal fraud prosecution, provided that the opinion represented is not in fact held or honestly entertained. See, United States v. Grayson, 166 F. 2d 863 (2d Cir. 1948); United States v. Rubinstein, 166 F. 2d 249 (2d Cir. 1948); cert. denied, 333 U.S. 868 (1947); Irwin v. United States, 338 F. 2d 770, 774 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965). This is so because the only representation of existing fact embodied in a statement of opinion or prediction is the implicit representation that such opinion is in fact held. As the Second Circuit wrote in Rubinstein, supra, 166 F. 2d, at 255:

> "Even if these statements were but expressions of opinion, pertaining to future matters only, the making of them implied that the makers believed them to be true. If this belief were not honestly entertained, therefore, the statements contained a misrepresentation of present fact." (Emphasis added.)

But there are charges in the instant indictment relating to alleged expressions of opinion which base their claim of falsity on the future occurence or non-occurence of certain contingencies. Thus, the indictment charges that defendants' representation that Rio Rancho was a safe, sound, secure, and risk-free financial investment was false (Indictment, Paragraphs 14, 18[h], [i], and [j]) because:

1. the overwhelming majority of purchasers would be unable to resell their land at a profit within the foreseeable future (Paragraphs 16, 18[k][i]);

2. the overwhelming majority of purchasers would not move to Rio Rancho Estates (Paragraphs 18[k][viii]);

3. the growth of Albuquerque would not have any significant effect on the demand for lots at Rio Rancho (Paragraphs 16, 18[m][ii]);

4. the lots would not be improved with water, utilities, and other customary amenities (Paragraphs 16, 18[o][ii]);

5. every lot sold would not become part of a developed community (Paragraphs 16, 18[o][iii]) and the overwhelming majority of lots would lie empty and undeveloped for the indefinite future (Paragraphs 16, 18[o][iv]);

6. commercial lots would not in the future be surrounded by contiguous development (Paragraphs 16, 18[o][vi]); and

7. defendants may not be able to acquire sufficient water rights to support a fully developed Rio Rancho (Paragraphs 16, 18[q][iii], [iv]).

What is a safe, secure, or sound investment for all the future is necessarily highly speculative and not susceptible to an objective determination, and certainly not one beyond any reasonable doubt. And, the future value of land presents an extreme example of the difficulty, indeed impossibility, to be encountered by a finder of fact on the issue of whether an opinion is fraudulent.

In dismissing an action which alleged a fraudulent representation as to the future value of land, the Supreme Court recognized in Gordon v. Butler, 105 U.S. 553, 558 (1881), that:

> "Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries."

As in Gordon v. Butler, supra, the indictment here predicts ominously "contingencies which may never occur, or developments which may never be made," such as the claimed future inability to resell "the overwhelming majority of * * * lots * * * at a profit;" future failure of the defendants to "improv[e] the lots being

sold with water, utilities and other customary amenities;" future failure of the defendants' "'master plan' [to] assure[ ] that the lots sold would ever become part of a developed community;" future lack of intent on the part of defendants to "substantially or completely develop[ ] Rio Rancho Estates as a 'master-planned community';" and future lack of expectation on the part of defendants "that Rio Rancho Estates * * * would be developed in less than 200 years" (see, e.g., Indictment, Paragraph 16, p. 5).

In sum, to a large degree, the indictment bases its charge of criminal fraud on what may or may not happen in the future.

United States v. Diamond, Docket No. 66-205-G-CA (S.D. Fla. Feb. 20, 1967) (unreported),* is particularly apposite. In that case District Judge Atkins struck allegations of an indictment on the ground that opinions as to future value were not provably true or false. The opinions claimed false by the government and stricken in Diamond are strikingly like those in the indictment at bar: that the purchase of "Arizona Ranchettes" provided an "investment opportunity" which assured purchasers of "future monetary

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* Annexed as Appendix A to this memorandum is a copy of the unreported order in United States v. Diamond, supra, and the paragraph ordered stricken from the Diamond indictment.

profits to be gained from increasing values of land which was a certainty because of assured improvements and rapid growth of population * * *."

The danger of allowing a charge such as this to stand is that in principle it permits the prosecution of anyone who sells with confidence a product which has not had its intrinsic future value established for all time by history. Developers of land, inventors of new products or entrepreneurs with new business concepts, under the basic principle sought by the government in this case would sail in the most treacherous of waters in seeking public money to advance their ideas.

The fundamental unfairness of the prosecution theory in this case is, perhaps, best articulated by Judge Brieant's observation in Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045 (S.D.N.Y. 1975) that Rio Rancho's future value depends upon its future development:

> "Vacant land in arid New Mexico would not have increased in value appreciably had it not been developed." 'Id., 401 F. Supp. 1045, at 1050.)

Whether Rio Rancho land will continue to be developed by defendants or others and thus vindicate the opinion attributed to defendants that it is a safe and secure investment is not a question which a petit jury can decide.

Accordingly, those allegations which charge a fraud predicated on the claim that future events will or will not occur should be stricken from the indictment.

POINT V

Defendants Howard W. Friedman and Henry L. Hoffman join in the motions made by other defendants in this case insofar as applicable to them.

CONCLUSION

Defendants' motions should be granted in all respects.

January 23, 1976

Respectfully submitted,

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Appendix A

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 66-205-Cr-CA

UNITED STATES OF AMERICA

v

HAROLD H. DIAMOND, SAM SACKS, BERNARD SACKS, SAUL MARKOWITZ, MAC WINSBERNER and HAROLD ZIDE,

ORDER

THIS CAUSE came on for hearing pursuant to the defendants' motions to dismiss the indictment, to dismiss paragraph 7(d) and paragraph 8 of Counts 1 - 16 of the indictment, for discovery and inspection, for a bill of particulars, and for a severance.

The Court, having heard argument of counsel, considered the memoranda of law filed by the parties in support of their respective positions, taken the matters under advisement, and being otherwise fully advised in the premises of this action,

ORDERS AND ADJUDGES:

1. The motion to dismiss the indictment is hereby denied.

2. The motion to dismiss paragraphs 7(d) and 8 of Counts 1 - 16 of the indictment is granted as to paragraph 8 of Counts 1 - 16 of the indictment and denied as to paragraph 7(d) of Counts 1 - 16 of the indictment.

3. The motion to suppress the evidence is denied as the same was withdrawn by the movants at the time of the hearing.

4. The motions for discovery and inspection and for a bill of particulars are moot as the same were agreed to by the defendants and the Government. According to the terms of the agreement, the Government is to produce for inspection and copying

those matters enumerated in the motion at a time and place mutually convenient to both sides. The motion for a bill of particulars is withdrawn without prejudice pending the discovery and inspection by the defendants of the designated matters in the motion.

3. The motion for severance is hereby denied.

DONE AND ORDERED at Miami, Florida, this 27th day of February, 1957.

E. CLYDE ATKINS

United States District Judge

cc. U. S. Attorney
James J. Hogan, Esq.
Bass & Friend
Jacob W. Friedman, Esq.
Frates, Fay, Floyd & Pearson
Kanne & Dickart
John J. Flynn, Esq.

The following is Paragraph 8 from the indictment in United States v. Diamond which was stricken by the court:

> "It was a further part of said scheme and artifice to defraud that the defendants would and did omit and fail to disclose material facts in advertising brochures, leaflets, letters and other material sent by the United States mails to the persons intended to be defrauded, and use and include in said advertising brochures, leaflets, letters and other material, various photographs, quotations, statements, artifices and devices, including and in addition to the representations previously referred to herein, calculated and intended by their form, terms and manner of display to mislead and deceive the persons intended to be defrauded into believing the land offered for sale in the said Arizona Ranchettes subdivisions was particularly suitable for retirement, residential, recreational occupancy or investment opportunities, and that the purchase of land in said subdivisions which the defendants were soliciting the said persons to make, or which said persons had already made, assured the said purchasers of future monetary profits to be gained from increasing values of the land which was a certainty because of assured improvements and rapid growth of population in the said subdivisions due to the thousands of persons who had purchased land in the said subdivisions; well knowing at the time that the said omissions, failures to disclose, photographs, statements, quotations, artifices and devices, then considered in the light of their form, terms and manner of display, would be and were misleading, false and fraudulent when made."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 75 Cr. 1023 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

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REPLY MEMORANDUM

This memorandum is submitted in reply to the government's memorandum of law in opposition to defendants' non-discovery motions (Points IV and V) and in further support of the motions of defendants Howard W. Friedman and Henry L. Hoffman for a dismissal of the indictment and an in camera inspection of the grand jury minutes.

POINT I

PROSECUTION OF THE INDICTMENT VIOLATES DUE PROCESS

The government completely mischaracterizes defendants' argument. Defendants do not argue that filings of disclosure statements made under federal and state land sales statutes and regulations result in automatic "grants of immunity from fraud prosecutions" (government's memorandum of law, p. 48). Nor do defendants invoke the principle of "estoppel" (government's memorandum of law, pp. 49-52). Rather, defendants submit that prosecution of the indictment violates due process in that the conduct alleged as criminal

has been subject to years of close regulatory scrutiny by the government* with the result that this conduct has been officially approved as complying with the law. The government's effort to punish conduct which has been accepted and approved by government regulators is fundamentally unfair and violative of due process because defendants have relied on that acceptance and approval as official guidance that they were conducting their business properly and lawfully.**

The government claims that defendants' reliance on United States v. Pennsylvania Industrial Chemical Corp., ("PICCO"), 411 U.S. 655 (1973), is "wholly misplaced" (government's memorandum of law, p. 42). Although the Supreme Court in PICCO did not order the dismissal of the indictment, the Court remanded the case to the District Court because there was no record as to whether the defendants had relied on the guidance of the Army Corps of Engineers

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*Both New York State and the federal government have reviewed and examined defendants' disclosure statements and have continually accepted them as fully complying with laws and regulations mandating truthful and complete disclosures. All advertising and promotional literature ever used by defendants in New York have been inspected by the State for form, language, and content and approved prior to use on the basis of independent on-site inspections of Rio Rancho.

**Thus, defendants submit that as a result of continual government review and approval of their advertising, disclosure statements, and sales methods, they were affirmatively led to believe that their actions were lawful.

that the conduct charged as criminal was not violative of law and for a determination of whether that reliance was reasonable (id., 411 U.S., at 675). But the Supreme Court held that if there were such reliance:

> "* * * there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." (Id., 411 U.S., at 674.)

Thus, contrary to the government's analysis of PICCO (government's memorandum of law, p. 43), it is plain that the Supreme Court was not speaking merely of a trial defense, but explicitly recognized the propriety of a pre-trial factual determination of whether defendants relied upon government approval of their conduct so as to bar "the Government from proceeding with the prosecution" of that conduct. In the instant case, defendants have relied upon the acceptance and approval by government agencies charged with the duty of examining, reviewing, and passing their official judgments upon the very conduct charged in the indictment as criminal. As in PICCO, "traditional notions of fairness" require a dismissal of the indictment.

The government urges that "the actions of the Office of Interstate Land Sales cannot act as a bar to a federal prosecution" (government's memorandum of law, p. 50) and that "the actions of the Department of State of New York or any other state can[not]

bind the federal government" (id., p. 49). However, it is well established that the federal government may be estopped by actions of its own agencies (see, e.g., Moser v. United States, 341 U.S. 41 [1951]; United States v. Wharton, 514 F. 2d 406 [9th Cir. 1975]; United States v. Lazy FC Ranch, 481 F. 2d 985 [9th Cir. 1973]; Brandt v. Hickel, 427 F. 2d 53 [9th Cir. 1970]; United States v. Georgia Pacific Co., 421 F. 2d 92 [9th Cir. 1970]; United States v. Fox Lake State Bank, 366 F. 2d 962 [7th Cir. 1966]; Schuster v. Commissioner, 312 F. 2d 311 [9th Cir. 1962]; Podea v. Acheson, 179 F. 2d 306 [2d Cir. 1950]) and that state action may bind the federal government (see e.g., Gas Light Co. of Columbus v. Georgia Power Co., 440 F. 2d 1135, 1140 [5th Cir. 1971], cert. denied, 404 U.S. 1062 [1972]; Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F. 2d 248, 252 [4th Cir. 1971]).*

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*In Gas Light Co. of Columbus v. Georgia Power Co., supra, 440 F. 2d 1135, the Fifth Circuit held that where rates and practices of electric companies were subjected to regulation and supervision by a state regulatory commission which had approved the rates, the electric companies were not subject to suit under the federal antitrust laws charging a conspiracy to eliminate competition.

In Washington Gas Light Co. v. Virginia Electric and Power Co., supra, 438 F. 2d 248, the Fourth Circuit held that an electric utility company marketing practice of reducing the cost for underground transmission lines to building contractors who built all-electric houses was not subject to suit under the federal antitrust laws because the state regulatory commission had power to prohibit the challenged practices and by failing to prohibit the practices it had in effect approved of them.

But the point is that defendants do not seek to "estop" the prosecution on equitable grounds. The much more fundamental and constitutionally based concept of due process is what bars prosecution of the instant indictment. PICCO, supra, 411 U.S., at 674.

United States v. Sylvanus, 192 F. 2d 96 (7th Cir. 1951), cited by the government in support of its view that defendants' reliance upon the actions of the Department of State of New York in reviewing and approving the conduct charged here as criminal should be ignored (government's memorandum of law, p. 49), is inapposite. In that case the Illinois Insurance Department had reviewed and criticized certain statements contained in the defendants' advertising for its insurance policies. Although the defendants submitted revisions to the Department and the Department apparently approved of the revisions, the government's mail fraud prosecution was not based on advertising which had been approved by the State. Indeed, as the Seventh Circuit noted, "the correct advertising matter was [never] actually used by the company" (id., 192 F. 2d, at 104). Rather, the advertising which formed the basis for the prosecution "contained most if not all the features which the Department had previously found objectionable" (id.).

Here, defendants do not contend and it is not the fact that regulated industries are per se exempt from prosecution. In Sylvanus, supra, unlike the instant case, where allegedly false

advertising had been criticized and prohibited by the state, a federal prosecution was proper.

The instant case is exactly to the contrary of Sylvanus, in that the advertising was approved. The government's fraud prosecution is based upon statements contained in advertising and promotional literature which were submitted to New York's Department of State for its inspection as to form, language, and content. All advertising and literature were approved or revised by the state prior to use.*

Indeed, Congress and the Department of Housing and Urban Development ("HUD") have always permitted filings certified by New York State as effective under state law to be exempt from certain of the federal filing requirements..

Section 1708(a) of Title 15, United States Code grants to the Secretary of HUD the power to accept certain state filings

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*As pointed out in the memorandum of law submitted in support of the motions submitted by defendants Howard W. Friedman and Henry L. Hoffman, the Department of State has approved advertising and promotional literature containing nearly every one of the alleged misrepresentations enumerated in Paragraphs 18(i), (j), (l), and (p) of the indictment, and in many instances, multiple approvals were given (Defendants' Howard W. Friedman and Henry L. Hoffman memorandum of law, pp. 19-20). If the government seriously contends that certain claimed representations by the company or its employees were not reviewed and approved by New York's Department of State prior to use, then prosecution of this indictment should be limited to such representations.

made pursuant to state land sales disclosure laws and regulations as complying fully with the requirements of the federal Interstate Land Sales Full Disclosure Act ("the Act").* New York filings made pursuant to Article 9-A of the New York Real Property Law have been determined to satisfy certain federal filing requirements since the first regulations were issued by HUD under the Act. See, 24 C.F.R. §1710.25(1969); 24 C.F.R. §§1710.25, 1710.26 (1971); 24 C.F.R. §§1710.25, 1710.26 (1972); 24 C.F.R. §§1710.25, 1710.26 (1974).**

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*15 U.S.C. §1708(a) provides as follows:

> "In administering this chapter, the Secretary shall cooperate with State authorities charged with the responsibility of regulating the sale of lots in subdivisions which are also subject to this chapter and may accept for filing under section 1704 of this title and declare effective as a statement of record, if he finds such action to be appropriate in the public interest or for the protection of purchasers, material filed with and found acceptable by such authorities."

**24 C.F.R. §§1710.25 and 1710.26 (1974) provide, in pertinent part, as follows.

> "§1710.25 State filings--in general. (a) Material filed with and found acceptable by State authorities charged with the responsibility of regulating the sale of lots in subdivisions may be accepted for filing by the Secretary as meeting the requirements of this part if the Secretary determines such action to be appropriate and such determination is set forth in §1710.26.
>
> * * *

The government's suggestion that defendants may have "duped" government regulators* (government's memorandum of law,

fn. cont'd.

> §1710.26 State filings--acceptable filings. (a) Pursuant to §1710.25, the Secretary may determine from time to time that material filed with and found acceptable by state authorities may be accepted as meeting the requirements of this part. * * * (b) Developers who have effective filings with the States listed below and whose filings have been accepted by the Secretary prior to January 1, 1975, may continue to have consolidations and amendments to those filings accepted by the Secretary pursuant to §1710.25:
>
> (1) California
> (2) Florida * * *
> (3) Hawaii * * *
> (4) New York
>
> Material filed with one of the above States for a subdivision located outside of that State will not be acceptable as a Statement of Record for the purposes of this part unless some of the lots to be offered in the subdivision are filed and effective with the state and the Office of Interstate Land Sales Registration prior to April 1, 1974. The developers of such subdivisions may continue to file amendments and consolidations in accordance with the procedures for state filings."

A proposed amendment to eliminate Florida as a state in which filings would satisfy the federal law has been temporarily enjoined from adoption by the United States District Court for the Middle District of Florida (State of Florida ex rel. Shevin v. Lynn, Docket No. 74-790-CIV-T-H [M.D. Fla. December 31, 1974]).

*One of these government regulators, an attorney with the New York Department of State, who had told the prosecutrix that he had found defendants' advertising representations regarding the growth of Albuquerque towards Rio Rancho to be truthful and permitted them to be made, was not invited into the grand jury. (See Arkin affidavit submitted in support of motions, pp. 2-3.)

p. 48) is baseless. Nowhere in its 277 pages of briefs and affidavits does the government specify exactly how the agencies were "duped" by defendants. Nor does the indictment charge such a violation (see, 15 U.S.C. §1703[a][2][B]).

Finally, the government seriously misstates and confuses defendants' argument with respect to the approval of advertising by New York's Department of State. Defendants have never represented and do not assert here that government regulators have approved of the sale of Rio Rancho land (see government's memorandum of law, p. 46). The government's statements to the contrary are plainly false and its argument that the federal statutes and regulations (15 U.S.C. §§1707[b], 24 C.F.R. §1710.32[1973]) and the state statutes and regulations (N.Y. Real Property Law, §§338.8, 337-b.5, 19 N.Y.C.R.R. §135.13) prohibit the making of such representations are irrelevant to the issues at bar and totally miss the point (government's memorandum of law, pp. 33-40, 45-47).

The fact is that New York's Department of State does review advertising and promotional material by examining its form, language, and content (19 N.Y.C.R.R. §135.17[e]) prior to approving it as complying with the antifraud provisions of Article 9-A of the Real Property Law (N.Y. Real Property Law, §338.5 [b]). The Department's approval--based upon its own on-site inspections made repeatedly over the years--has been given to every

piece of defendants' advertising used in New York.

Defendants' reliance on that approval and the acceptance by state and federal regulators' of disclosure statements as accurate and complete "prevent[s] the Government from proceeding with the prosecution" (PICCO, supra, 411 U.S., at 674).

It follows that the indictment must be dismissed.

POINT II

THERE SHOULD BE AN IN CAMERA INSPECTION OF THE GRAND JURY MINUTES AND A DISMISSAL OF THE INDICTMENT

Defendants submit that there is substantial evidence to warrant an in camera inspection of the grand jury minutes to determine whether the government misled the grand jury by failing to (a) inform it of the existence of exculpatory evidence and (b) instruct it on the law as to an absolute defense. Exculpatory evidence central to the charges in the indictment relating to resale value, government approval of defendants' advertising, defendants' honestly held opinion that the purchase of lots in Rio Rancho was a safe and secure financial investment and the direction of Albuquerque's growth was apparently purposefully withheld from the grand jury.

It is also an undeniable fact from the face of the indictment (Paragraphs 18 [g] [xix], [xxiv]) that the grand jury was either not instructed or wrongly instructed as to the role of New York State in reviewing and approving the defendant Company's sales literature and disclosure statements.

The government does acknowledge the seriousness of these charges (government's memorandum of law, p. 54); yet there is no denial by the government that it withheld exculpatory evidence from the grand jury and failed to instruct the grand jury as to

the legal significance of evidence establishing an absolute defense. Rather, the government mischaracterizes the basis of defendants' motion as charging "subornation of perjury"* (government's memorandum of law, p. 55), then piously exclaims that "there is absolutely no substance to" such a charge (id.), and completely ignores the case authority relied upon by defendants which require the in camera examination by this Court of the grand jury minutes and the dismissal of the indictment. See, United States v. Ramirez, 482 F.2d 807 (2d Cir.), cert. denied sub nom Gomez v. United States, 414 U.S. 1070 (1973); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); United States v. Basurto, 497 F.2d 181 (9th Cir. 1974)**; United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975).

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*No such charge was ever made. It is defendants' assertion that the government misled the grand jury by excluding exculpatory evidence from its consideration, failing to inform it of the existence of exculpatory evidence, and failing to instruct it as to the legal significance of evidence establishing an absolute defense.

**The government's attempt at distinguishing Basurto, supra, fails. There is no rational distinction between misleading a grand jury by failing to disclose the use of false evidence and misleading a grand jury failing to disclose the existence of true exculpatory evidence.

The government's response to defendants' charge that exculpatory evidence available through Leonard Geller was suppressed is both misleading and disingenuous. Thus, the government makes the absurd suggestion that defendants' should have produced Geller's "sworn affidavit that he perjured himself in the grand jury" (government's memorandum of law, p. 54). But Geller is the government's immunized and cooperating witness. In the circumstances, the absence of Mr. Geller's affidavit denying that he was prohibited from revealing exculpatory evidence to the grand jury is a telling comment on the prosecution's conduct of the investigation. If anything, the government had the power and the obligation to bring forth the affidavit of its own witness to deny the allegation; having not done so it should suffer the obvious inference against it. Instead, the government made selective and incomplete reference to an affidavit submitted by Geller's attorney, John H. Doyle, III (government's memorandum of law, p. 55). Although Mr. Doyle states in his affidavit that Geller had assured him "that the totality of the testimony [Geller] did give to the grand jury was truthful and correct" (Doyle affidavit, p. 4), Doyle makes it clear that "there was sharp, and on occasion acrimonious, disagreement between the prosecutors and Mr. Geller about the correctness of certain positions that Mr. Geller took" (Doyle affidavit, p. 2). Doyle concludes, moreover, that he has no knowledge of whether or not the prosecutrix

excluded from the grand jury Geller's testimony as to those of his positions with which she disagreed. Thus, Doyle states as follows:

> "Because I was not present in the Grand Jury, I cannot assess the movants' claim that by reason of the Government's rejection of various factual positions taken by Mr. Geller, the inquiry in the Grand Jury was curtailed so as to avoid these matters and thereby withhold information that the jurors might have found exculpatory. Mr. Mark S. Arisohn, in an affidavit dated January 22, 1976, filed in support of the instant motion, describes with substantial accuracy some of the points of disagreement between the prosecutors and Mr. Geller. (See Arisohn Affidavit, p. 2, Second Full Paragraph, Second Sentence, and Third Full Paragraph; p. 3, Second and Third Paragraphs with Quotations; pp. 4-5, Points 1-5.) Whether the inquiry in the Grand Jury in fact skirted or slighted these areas can be readily ascertained by inspecting the minutes." (Doyle Affidavit, pp. 3-4)

That Mr. Friend may have given the grand jury exculpatory testimony (government's memorandum of law, p. 55), does not serve to erase the government's failure to inform the grand jury of Geller's favorable evidence. There is a vast difference between the impact on a jury of exculpatory evidence given by a soon to be indicted target (government's memorandum of law, p. 169) (cf. e.g., Reagen v. United States, 157 U.S. 301, 310 [1895]); United States v. Paccione, 224 F.2d 801, 803 [2d Cir.], cert. denied, 350 U.S. 896 [1955]; United States v. Mahler, 363 F.2d 673, 678 [2d Cir. 1966]) and that given by an immunized and cooperating government witness.

The government's reliance on United States v. Cummings, 49 F.R.D. 160 (S.D.N.Y. 1969); United States v. Callahan, 300 F. Supp. 519 (S.D.N.Y. 1969); and United States v. Kahaner, 203 F. Supp. 78 (S.D.N.Y. 1962) for the general proposition that an indictment valid on its face is sufficient if returned by a duly constituted and unbiased grand jury is inapposite. In United States v. Ramirez, supra, 482 F.2d 807, 812, the Second Circuit specifically ruled that an in camera review of the grand jury minutes was "the proper course for the trial judge to follow * * * to determine whether or not the grand jury was misled * * *." See also, United States v. Basurto, supra, 497 F.2d 781, 785; and cf. United States v. Dornau, 356 F. Supp. 1091, 1099-1100 (S.D.N.Y. 1973) (Metzner, J.).

The defendants' motion for an in camera inspection of the grand jury minutes should be granted and the indictment dismissed upon determination that the grand jury was misled as to the existence of exculpatory evidence and the legal significance of evidence establishing an absolute defense.

CONCLUSION

Defendants' motions should be granted.

March 23, 1976

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	75 Cr. 1023 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' NON-DISCOVERY MOTIONS.

The Government submits this memorandum of law in opposition to the defendants' omnibus pre-trial motions which seek dismissal of the indictment, the striking of language contained in the indictment, severance of various defendants and various pre-trial evidentiary hearings. The discussions of pertinent facts will be found at the appropriate section of this memorandum. The Government submits that each of the defendants' motions is without merit and should be denied.

I. THE INDICTMENT CHARGES AN OFFENSE UNDER BOTH THE MAIL FRAUD STATUTE AND THE INTERSTATE LAND SALES ACT

Defendants' Contentions

Defendants Carity and Daniel Friedman move to dismiss the indictment because it fails to charge an offense. Defendants contend that the indictment fails to charge any actual misrepresentations and thus it fails to make out a charge under the mail fruad statute or the Interstate Land Sales Full Disclosure Act (hereinafter "The Land Sales Act"). Defendants further contend that because the indictment allegedly does not charge actual misrepresentations there is no "duty to disclose" material facts set forth as omissions in the indictment. In other words, if we understand defendants' argument, they contend that where there are no actual misrepresentations there is no duty to disclose material facts within their possession even though those facts are necessary in order to make the statements that are made not misleading. Finally, defendants contend that representations set forth in the indictment are ordinary and usual "puffing" and mere statements of opinion which are not within the reach of the mail fraud statute and the Land Sales Act, and therefore the indictment must be dismissed.

Summary of Argument

Even assuming arguendo that defendants are correct and the indictment does not allege actual misrepresentations, as such, the cases are legion from the Supreme Court on down that actual misrepresentations are not necessary to establish a scheme to defraud. Moreover, neither logic nor the case law support defendants' novel theory that unless there are actual misrepresentations there is no duty to disclose material facts within the defendants' possession which are necersary to make the statements that are made not false and misleading. Finally, the charges in the indictment are fully supported by the case law and allege a scheme to defraud within the mail fraud statute and the anti-fraud provisions of the Land Sales Act.

ARGUMENT

It is truly astounding that defendants seriously contend that unless there is an actual misrepresentation there can be no scheme to defraud under the mail fraud statute or the Land Sales Act, and further that unless there is an actual misrepresentation there is no duty to disclose material facts which are necessary to make the statements that are made not misleading.

As far back as 1896, the Supreme Court considered and rejected the contention that the mail fraud statute only prohibited schemes to defraud based upon actual misrepresentations. In Durland v. United States, 161 U.S. 306, 313-14 (1896), the Court specifically rejected that argument holding that:

> It would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.

In McCarthy v. United States, 187 Fed. 117 (2d Cir. 1911), the defendants were convicted of devising a fraudulent scheme to sell worthless lots, which they described as in a "Park", and as if they were part of a well-established community. The Second Circuit relying on Durland, supra, affirmed the convictions and had no trouble finding the scheme fraudulent:

> Without containing an absolute misstatement as to any single fact, the whole description was carefully devised to lead prospective purchasers, resident some of them in distant states, to suppose that the 'Park' was practically an extension of the well-known 'Westhampton Beach,' with its churches, schools, electric light," etc. and that it was a 'surburban district of Greater New York.' Id. at 118.

The Government does not have to charge or prove that "if the words are parsed and the sentences grammatically analyzed, they are false". Linden v. United States, 254 F.2d 560, 568 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954). The Government need only charge and prove that the advertisements and representations were intentionally designed to mislead those responding to them. Donaldson v. Read, 333 U.S. 178, 188 (1948); Lustigar v. United States, 386 F.2d 132, 138 (9th Cir.), cert. denied, 390 U.S. 951 (1968); Cates v. Haderlein, 189 F.2d 369, 373 (7th Cir.), rev'd on other grounds, 342 U.S. 804 (1951).

In fraud cases the courts have taken into account that the buying public does not carefully weigh or study each word in an advertisement and that the ultimate impression upon the mind of the reader arises not only from what is said but all of that which is reasonably implied. Aronberg v. Federal Trade Comm'n, 132 F.2d 165, 167 (7th Cir. 1942). Thus, the courts have looked to what the net impression of the advertisement or representation is upon the purchasers to whom it is directed, Charles of the Ritz Dist. Corp, v. Federal Trade Comm'n, 143 F.2d 676, 679 (2d Cir. 1944); accord, Gusow v. United States, 347 F.2d 755, 756 (10th Cir. 1965); Colburn v. United States, 223 Fed. 590, 595 (8th Cir.),

cert. denied, 239 U.S. 643 (1915); United States v. Sheiner, 273 F.Supp. 977, 983 (S.D.N.Y. 1967), aff'd, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825 (1969); Gottlieb v. Schaffer, 141 F.Supp. 7, 17 (S.D.N.Y. 1956, Weinfeld, J); and the Supreme Court has held that "Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds." Donaldson v. Read, supra, 333 U.S. at 189; Wiser v. Lawler, 189 U.S. 260, 264 (1903).

In other words, the fact that exceptionally acute and sophisticated purchasers would not be misled would not be a bar to finding fraud, Donaldson, supra, 333 U.S. at 189; Gottlieb v. Schaffer, supra, 141 F. Supp. at 17; because the "laws are made to protect the trusting as well as the suspicious." Federal Trade Comm'n. v. Standard Education Society, 302 U.S. 112, 116 (1937). While some of the above cases involved civil fraud it is well settled that the criteria of fraud evolved in civil cases are applicable to prosecutions under the mail fraud statute. Foshay v. United States, 68 F.2d 205, 210-11 (8th Cir. 1933), cert. denied, 291 U.S. 674 (1934); United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932); United States v. Hannigan, 303 F.Supp. 750, 754 (D. Conn. 1969).

Turning now to defendants' second contention that there is no duty to disclose material facts unless there is a misrepresentation again the Supreme Court and the lower courts have rejected this argument.

The Supreme Court in Wiser and in Donaldson, supra, rejected the contention that unless there are actual misrepresentations there is no duty to disclose material facts. The Court in those cases took into account that a failure to disclose material facts can in and of itself make the statements made misleading and fraudulent. For example, in Wiser, the Supreme Court found that prospectuses used to induce people to purchase stock were "even more damaging in their omissions than in their statements." The Court held that "in estimating the probability of subscribers being misled by these prospectuses we may take into consideration not only the facts stated, but the facts suppressed." 189 U.S. at 264 (emphasis added). In Donaldson the Supreme Court had before it the same issue with respect to advertising and reached the same conclusion.

> Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.*** 333 U.S. at 188 (emphasis added).

It is well settled that willful concealment of material facts is as much a fraud as affirmative misrepresentations. Slaughter v. Jefferson Fed. Sav. & Loan Assoc., 361 F. Supp. 590, 598 (D. D.C. 1973); accord; Blachey v. United States, 380 F.2d 665 (5th Cir. 1967); Cacy v. United States, 298 F.2d 227, 229 (9th Cir. 1961); McNabb v. Thomas, 190 F.2d 608, 609 n.1 (D.C. Cir.), cert. denied, 342 U.S. 859 (1951).

Finally, defendants allege that the representations set forth in the indictment are ordinary and usual "puffing" or mere statements of opinion not within the reach of the mail fraud statute or the anti-fraud provisions of the Interstate Land Sales Act and therefore the indictment must be dismissed.

Whether a representation is mere "puffing" and not intended to be taken seriously by the purchaser is a question of fact for the jury, United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932) and is not a proper basis for a motion to dismiss an indictment prior to trial.

In any event, representations and material omissions identical or similar to those made by these defendants have long been held to be part of a scheme to defraud where they

have been used, as they were in this case, to induce people to invest money, and the courts have rejected repeatedly defendants' hopeful claims that they constitute mere "puffing" or statements of opinions.

For example, courts consistently have held that when lots in a subdivision or cemetary have been sold as safe, risk-free financial investments which can be resold at substantial profits, those representations are not mere "puffing" or statements of opinion but are part of a scheme to defraud when in fact, as here, the resale possibility is slim and the investment is highly speculative and risky. Denver v. United States, 155 F.2d 740 (D.C. Cir.), cert. denied, 329 U.S. 766 (1946); Blue v. United States, 138 F.2d 351, 357 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944); United States v. Beck, 118 F.2d 178, 181 (7th Cir. 1941), cert. denied, 313 U.S. 587 (1941); Huteson v. United States, 67 F.2d 731, 732 (7th Cir. 1933) cert. denied, 292 U.S. 627 (1934); Accord, Glen-Arden Commodities, Inc v. Costantino, 493 F.2d 1027, 1032 (2d Cir. 1974) (scotch whiskey futures); United States v. Grayson, 166 F.2d 863, 866 (2d Cir. 1948) ("royalties" in oil fields); United States v. Wernes, 157 F.2d 796, 798 (7th Cir. 1946) (oil leases); United States v. Earnhardt, 153 F.2d 472 (7th Cir.), cert. denied, 328

U.S. 858 (1946) (oil leases); Perry v. United States, 136 F.2d 109 (10th Cir.), cert. denied, 320 U.S. 743 (1943) (oil and gas leases); Foshay v. United States, 68 F.2d 205, 207-08 (8th Cir.), cert. denied, 291 U.S. 674 (1934) (stock).

In Deaver, defendants were convicted of mail fraud in connection with the sale of burial plots in a Memorial Park in Maryland to people living in distant states. Representations were made that when the Memorial Park reached an advanced stage of development the plots could be resold at handsome profits through a "resale division" to be established. Representations were made to prospective purchasers that burial space in and around the Washington area was very limited, thus assuring a "brisk resale" of the sections. 155 F.2d at 742. The promised rewards did not materialize. Defendants in Deaver also contended that these representations were no more than "seller's talk" or "puffing". Ibid. The court rejected this stating:

> Here the customers thought they were getting burial sections in a rapdily developing cemetary park, they were led to believe that the market for plots was exceedingly good, and that defendant and his associates would launch a resale program that would net the investment purchasers a generous profit. The deception charged went to the very substance

of the transaction. Id. at 743.*

In Blue, defendants were also convicted of mail fraud in connection with the sale of burial lots for investment. In Blue, as in the instant case, fraudulent representations were made to prospective purchasers that "the investments were safe - safer than any other type of investments," (138 F.2d at 357; see Indictment herein ¶ 18(j), pp. 19,20**); "that the Government was behind the cemetery projects and that the state had provided the cemetery plan for people who needed income investments," (Ibid; Indictment ¶ 18(g) xxv), p. 16); "representations that all the lots had already been sold in certain cemeteries, [were] made for the purpose of persuading prospective investors that the projects were successful and that they might lose the opportunity to profit therefrom," (Id. at 357-58; Indictment ¶ 18(g) x, xi); pp. 10,11); and "that the cemeteries were necessary in the various localities." Id. at 358; Indictment ¶ 18(l),(m),pp. 23-25).

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* As in Deaver the evidence at trial will also show that many prospective purchasers were also told that defendants would set up a resale office to resell their lots at Rio Rancho. No such resale office ever materialized. Glen-Arden, supra, 493 F.2d at 1035; United States v. Beck, supra; Harris v. United States, supra, 261 F.2d at 796; Perry v. United States, supra, 136 F.2d at 110; United States v. Earnhardt, supra. In fact, defendants knew and failed to reveal that there had been little or no resale market for these lots during the entire 14 years they were selling them. Irwin v. United States, 338 F.2d 770, 773-74 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965).

** Refers to fraudulent representations similar or identical to those quoted from Blue.

So too the Courts have rejected arguments that representations as to the value of land are mere statements of opinion or "puffing" and can not be the basis of a criminal fraud prosecution when the price charged is far in excess of any real market value, United States v. New South Farm, 241 U.S. 67, 71-72 (1916); Huteson v. United States, supra, 67 F.2d at 732; United States v. Rowe, supra, 56 F.2d at 749. This is especially so where the prospective purchasers had no experience in real estate, Huteson v. United States, supra, 138 F.2d at 355-56; or were located in distant states, McCarthy v. United States, supra, 187 Fed. 117; Deaver v. United States, supra; and where defendants held themselves out as brokers or advisors on whom the purchasers should rely, Rowe v. United States, supra, 56 F.2d at 749; See also, McNabb v. Thomas, supra, 190 F.2d at 610; United States v. Hannigan, supra 303 F.Supp. at 754; Scott v. Burnight, 107 N.W. 422, 131 Iowa 507 (1906).

In Huteson, supra, the court found that the price the lots were sold at was "far in excess of any actual value, and the lots were not resalable at a profit by ordinary methods without false representations and promises as defendants well knew." Huteson, supra, 67 F.2d at 732.

In the instant case defendants represented that these were valuable "homesite" lots in a "Master Planned" community, and that the price included water, utilities and paved roads. In fact, these were semi-arid desert lots improved only by dirt

roads, and without water and utilities. Thus, without the promised improvements the lots did not have a value consistent with the price which purchasers paid. United States v. New South Farm, supra, 241 U.S. at 71-72; McCown v. Heidler, ____F.2d____, (10th Cir. Dkt. No. 74-1755 December 22, 1975); United States v. Diamond, 430 F.2d 688, 690 (5th Cir. 1970); Golubin v. United States, 393 F.2d 590 (10th Cir.), cert. denied, 393 U.S. 831 (1968); Lustiger v. United States, supra; Windsor v. United States, 384 F.2d 535 (9th Cir. 1967); Phillip v. United States, 356 F.2d 297 (9th Cir.), cert. denied, 384 U.S. 952 (1966); Harris v. United States, 261 F.2d (9th Cir. 1958); Huteson v. United States, supra, 67 F.2d at 732; United States v. Rowe, supra; Colburn v. United States, supra; McCarthy v. United States, supra.

As the evidence at trial will show, defendants representations were not mere "puffing" or statements of opinion but the essential inducements upon which purchasers relied in buying these lots. and were part of a scheme to defraud under the mail fraud statute and the anti-fraud provisions of the Interstate Land Sales Full Disclosure Act.

II. DEFENDANTS' MOTION TO DISMISS THE INDICTMENT FOR VAGUENESS IS FRIVOLOUS

It is hard to believe that having characterized the indictment as pleading "detail ad nauseum" (Br.* p. 53), the defendants at the same time move to dismiss the indictment for vagueness! This indictment is not vague. It is explicit and describes a massive scheme to defraud the general public. Defendants claim that the indictment is vague for use of such words as "safe", "sound", "secure". When the defendants used these words in their advertising and sales presentations they were not vague and indefinite, and the defendants knew very well what those words meant to those who listened to them and relied upon them. Nor have the courts had any difficulty in understanding what the words "safe" and "secure" mean when used to induce people to invest money. McCown v. Heidler, supra, Slip op. pp. 11-13; Glen-Arden Commodities, Inc. v. Costantino, supra, 493 F.2d at 1032; United States v. Grayson, supra, 166 F.2d at 866; United States v. Wernes, supra, 157 F.2d at 798; Deaver v. United States, supra; Blue v. United States, supra, 138 F.2d at 357; Huteson v. United States, supra; Perry v. United States, supra.

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* Refers to Brief of Defendants Howard Friedman and Hoffman.

For years the defendants reaped the benefits of selling lots at Rio Rancho as safe and secure financial investments. Yet they now come before this Court and say they do not know what those words mean. They test the patience and credulity of this court in making such frivolous claims.

On a motion to dismiss for vagueness the test is whether the indictment sufficiently informs the defendant of the offense with which he is charged so as to enable him to prepare a defense. Wong Tai v. United States, 273 U.S. 77 (1927); United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir. 1975), cert. denied, _____ U.S. _____, 44 U.S.L.W. 3201 (U.S., Oct. 7, 1975). This indictment certainly meets that test The indictment charges, and the evidence at trial will prove, a massive scheme to defraud the general public. Yet the defendants argue that the Indictment does not tell them whom they intended to defraud. (Br. 45). Defendants' reliance on United States v. Agone, 302 F.Supp. 1251 (S.D.N.Y. 1969) is wholly misplaced. In Agone the offense charged was an assault on a single unnamed individual. There the court held the identity of the individual was essential for valid indictment.

The defendants allege as inflammatory the phrase "persons to be defrauded". It is not inflammatory but

descriptive and a similar motion to strike such words from an indictment has been denied. United States v. Van Allen, 28 F.R.D. 329, 345 (S.D.N.Y. 1961).

Defendants next contend that the representations charged in the indictment are vague because they are subjective and have no fixed meaning. This is frivolous. The indictment charges the defendants in the language of their own representations which they now claim are ambiguous and could mislead a jury. The point is that if they are ambiguous, they were intentionally ambiguous. If they are capable of misleading a jury, they were intended to mislead the purchasing public. In any event, "a well intentioned man should have no difficulty in understanding their meaning." United States v. Pope, 189 F.Supp. 12, 21 (S.D.N.Y. 1960). The indictment is not vague; it merely sets forth what defendants did and said and, as such, charges a scheme to defraud within the reach of the mail fraud statute and the Interstate Land Sales Act. The defendants' motion to dismiss the indictment for vagueness is frivolous and must be denied.

III. DEFENDANTS' MOTION TO STRIKE LANGUAGE IN THE INDICTMENT IS WITHOUT MERIT

Defendants move to strike language in paragraphs 15 and 16 of the indictment to wit: "a variety of false . . . representations" and "among other things" in paragraph 15* and "among many other relevant facts" in paragraph 16.** Defendants argue that these phrases must be striken in order to protect against the Government expanding upon charges that may not have been before the Grand Jury.

Phrases such as "among other things" and "among many other relevant facts" go to the proof to sustain the charge of a scheme to defraud and can be likened to an overt act in a conspiracy charge where the Government is not required to set forth all of the facts relied upon

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* 15. It was a part of the scheme and artifice to defraud that the defendants and co-schemers would and did cause lots in Rio Rancho Estates to be sold by means of high-pressure sales techniques which involved a variety of false and fraudulent pretenses, representations, promises and means which were designed and devised by them to mislead the persons to be defrauded to believe, among other things, . . .

** 16. It was further part of the scheme and artifice to defraud that the defendants and co-schemers would and did deliberately conceal and fail to convey to the persons to be defrauded information within the possession of the defendants and co-schemers which they knew would show that the purchase of "homesite" and/or "commercial" lots was not a sound risk-free financial investment, but was an exceptionally poor, risky, and dangerous investment; and, among other relevant facts, the defendants and co-schemers failed to reveal and convey to the persons to be defrauded . . .

to effectuate the conspiracy. United States v. Mayo, 230 F.Supp. 85 (S.D.N.Y. 1964).

In United States v. Caine, 441 F.2d 454, 457 (2d Cir.), cert. denied, 404 U.S. 827 (1971), a mail fraud prosecution, the Second Circuit stated as follows in responding to an argument that the trial court erred in permitting the Government to introduce evidence of defendants' failure to give refunds when the indictment did not specifically charge that as part of the scheme to defraud:

> In the present case the grand jury obviously considered defendants' entire advertisement, and listed 12 of the false advertising claims in addition to using the phrase "among others." The grand jury's failure to specifically mention fraud with respect to refunds was most likely due to the belief that further spelling out of defendants' fraudulent scheme was redundant. 441 F.2d at 456-57.

The point is well taken in the case at bar. Here as in Caine the phrase "among other things" and "among many other relevant facts" refers to a summary of the many ways in which the scheme was carried out. United States v. Mayo, supra.

Moreover, in Caine, supra, the Second Circuit distinguished United States v. Pope, 189 F.Supp. 12, 25-26 (S.D.N.Y. 1960), which is relied upon by the defendants

herein, on the ground it did not involve a scheme to defraud but rather false statements in proxy solicitations and reports to the SEC. In Pope the district court struck the phrase "among other things."

Given the detail with which the indictment delineates the scheme to defraud, the defendants can not possibly claim surprise or inability to prepare a defense or that the Government's proof will include matters not considered by the Grand Jury as part of the scheme to defraud. United States v. Caine, supra. Accordingly, defendants' motion to strike these phrases from the indictment should be denied.

The defendants further argue that the indictment contains erroneous statements of law and allegations relating to the commission of uncharged crimes which allegations must be striken from the indictment as prejudicial and inflammatory. In particular, the defendants object to the paragraphs in the indictment alleging that the filing of Federal Property Reports, New York State Offering Statements, and advertising with the State of New York did not constitute approval by these agencies, and it was a crime, as defendants well knew, to so represent. The defendants argue that this language must be stricken because it asserts that defendants

committed a crime with which they are not charged. The defendants also complain that the allegation that the information included in the Property Reports and Offering Statements was "ambiguous, incomplete, inaccurate, and misleading" charges a separate offense under the regulatory statutes and this also must be stricken.

The answer to these arguments is obvious. These allegations are not "prejudicial surplusage". United States v. Bonanno, 177 F.Supp. 106, 116 (S.D.N.Y. 1959). These allegations are an integral part of the scheme to defraud with which defendants are charged and therefore the court is without power to strike them. United States V. Quinn, 349 F.Supp. 232 (E.D. Wis. 1972), aff'd, 481 F.2d 1406 (7th Cir. 1973). On a motion to strike under Fed. R. Crim. P. 7(d), the court is limited in its power to strike as "surplusage" only immaterial and irrelevant allegations which may be prejudicial. United States v. Chas. Pfizer & Co., 217 F.Supp. 199, 201 (S.D.N.Y. 1963). The fact that these allegations may constitute a separate offense with which the defendants might have been charged is not a basis to strike them from the indictment when the purpose of such allegations is to spell out an integral part of the scheme to defraud. Ibid. Indeed all aspects of the scheme to defraud are prejudicial to the defendants because

they establish what crime was committed, but this is not a valid basis for a motion to strike. These representations of submission to and approval by government agencies, as the proof at trial will show, were material inducements to purchasers who were investing money in lots at Rio Rancho. United States v. Blue, supra, 138 F.2d at 357. Obviously, it was for this very reason that defendants used this ruse, knowing full well it was a crime to do so* and it is equally obvious that is why the Grand Jury included it as part of the scheme to defraud. The indictment as drafted is correct and fairly states the government's proof against the defendants.

The defendants next complain about the "ad nausem" detail concerning the defendants' selling techniques and move to strike several paragraphs of the indictment (Br.** 54-56). The selling techniques are an integral part of the scheme to defraud and the reason why the defendants were so successful in selling lots to over 45,000 purchasers over a 14 year period. As defendants well know, and as the proof at trial will conclusively establish, all of these selling techniques were an integral part of making the sale, and it was proper for the Grand Jury to consider and allege the defendants' sales format and techniques as a whole rather than separate out

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* See pages 29-40 infra, for a discussion of the federal and New York State statutes and regulations.

** Refer to Brief of defendants Howard Friedman and Hoffman.

only some aspects of the sales presentation. The sales presentation must be considered in its totality. Gottlieb v. Schaffer, supra, 141 F.Supp. at 17.

These selling techniques were used throughout the nation, and salesmen were trained to use these techniques in selling lots at Rio Rancho. The Grand Jury understood the importance of these selling techniques and chose to set them forth in detail in the indictment recognizing that they were essential ingredients to defendants' success in perpetrating this fraud. The Courts have long ago rejected defendants' arguments and held that similar allegations and proof are appropriate since they prove the scheme to defraud.

The defendants object to the language of "high-pressure sales techniques". However, the Second Circuit has recently observed that one of the purposes of the Interstate Land Sales Act was to combat, to use the Court's phrase, "high-pressure sales techniques". United States v. Goldberg, supra, Slip op. p. 754. See also, United States v. Uhrig, 443 F.2d 239, 242 (7th Cir.), cert. denied, 404 U.S. 832 (1971) (use of "hard sell").

The defendants make the conclusory statement that the allegations regarding sales techniques are not essential to pleading the crimes charged. Defendants offer no explanation as to why this is so. Instead the defendants merely refer

to "illustrative" examples of sales techniques in a footnote. (Br. p. 54-56). The fact is that allegations and proof of similar or identical sales techniques have been held probative of the existence of a scheme to defraud.

For example, defendants complain about the allegation that free dinners and sales presentations were designed to induce the persons to be defrauded to sign contracts to purchase lots at Rio Rancho. (Br. p. 54). However, in Huteson v. United States, supra, the court in describing the scheme to defraud noted that defendants invited prospective purchasers to "free lunches in order to induce them to listen to a lecture by one of the defendants extolling real estate investments in general, with particular reference to the subdivision they were attempting to sell." 67 F.2d at 732. And in Gusow v. United States, supra, 34, F.2d at 757, a mail fraud prosecution involving recruitment for alleged jobs abroad, the court noted that the primary purpose of an "interview" was to obtain the applicant's signature on a contract.

Defendants also object, and presumably move to strike, the allegation in the indictment that the sales presentations were designed to exploit any lack of financial sophistication and knowledge on the part of the persons to be defrauded. Yet the courts have long considered this a crucial element in a scheme to defraud. Durland v. United States, supra; Huteson v. United States, supra; Blue v. United

States, supra; United States v. Rowe, supra; Deaver v. United States, supra; accord, Lemon v. United States, 278 F.2d 369 (9th Cir. 1960); Walters v. United States, 256 F.2d 840 (9th Cir.), cert. denied, 358 U.S. 833 (1958). Moreover, in Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1936), the court said:

> If one sets out to victimize persons least able to guard themselves against fraudulent schemes he may not with justice complain if their status is disclosed, and the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artiface.

Likewise defendants object and move to strike allegations that salesmen held themselves out as land consultants and thereby discouraged purchasers from consulting knowledgeable investment advisors. Here too the courts have found this to be a critical factor in determining whether there was a scheme to defraud. United States v. Rowe, supra; McNabb v. Thomas, supra; United States v. Hannigan, supra; accord, Glen-Arden Commodities, Inc. v. Costantino, supra, 403 F.2d at 1032.

So too the courts have considered as part of a scheme to defraud the appeal to impulse sales and representations made for the purpose of persuading prospective purchasers that unless they acted immediately they might lose the opportunity to purchase lots. Blue v. United States, supra, 138 F.2d at 357-38.

Defendants next object to the allegation relating to carefully supervised tours. However, in Estep v. United States, 140 F.2d 40 (10th Cir. 1943), a mail fraud scheme involving the sale of mining stock, the court noted that part of the scheme to defraud was to induce prospective investors to visit the mines where they inspected them "under the guidance and supervision of defendants", and as a result of these "inspections" (tours) purchasers were induced to increase their holdings. 140 F.2d at 44.

The Courts have also taken into consideration as evidence of a scheme to defraud circumstances where customers were discouraged from reading contracts or where alleged disclosures were concealed in fine print, Irwin v. United States, 338 F.2d 770, 775-76 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965); United States v. Littlejohn, 96 F.2d 368, 373 (7th Cir. 1938); United States v. Sylvanus, 192 F.2d 96, 105, 109 (7th Cir. 1951); Gottlieb v. Schaffer, supra, 141 F.Supp. at 17; or where material was designed and used in such a way that it would not be read closely. Donaldson v. Read, supra, 333 U.S. at 189; Linden v. United States, supra, 254 F.2d at 568.

Defendants also object to allegations in the indictment concerning the defendants' revisions of their advertising beginning in 1972 because defendants came to fear that they might have increasing difficulties with state and federal regulatory agencies. The Grand Jury found that this was a necessary and integral part of the scheme to defraud, and the Government's evidence at trial will conclusively establish

this. Moreover, in United States v. Littlejohn, supra, a scheme to defraud in connection with the sale of insurance, the court noted:

> There is considerable evidence in the record which indicates that Mr. Littlejohn was anticipating an early demise of the National Aid Societies for reasons other than his knowledge of their inherent financial weakness. There are many references in letters to and from Mr. Littlejohn which show a knowledge of a legislative and administrative policy in different states adverse to the activities of the National Aid Societies. 96 F.2d at 379.

The evidence in the instant case will likewise show a knowledge on the part of the defendants of legislative and administrative policies in different states adverse to AMREP's advertising and sales practices. The evidence at trial will conclusively establish that out of fear of increasing difficulties with these regulatory agencies the defendants revised their advertising beginning in 1972 to shade and qualify the language used concerning investment without at the same time changing the effect of these materals as inducements to financial investment.

In sum, the defendants have totally failed, and indeed have not even attempted, to show that the sales techniques are immaterial and irrelevant to the scheme to defraud and apt to convey inadmissible material to the jury when the indictment is read. Accordingly, their motion to strike these allegations as mere "surplusage" must be denied. United States v. Dioguardi, 332 F.Supp. 7, 23 (S.D.N.Y. 1971).

The defendants' arguments that certain representations were mere statements of opinion as to the future is discussed supra at pages 8 - 13. As stated above, that argument is a question of fact for a jury. It is not a proper basis for a motion to strike language in an indictment as "surplusage". Moreover, the defendants must await the trial to put in any defense of "good faith". Certainly this court on pre-trial motions can not decide the issue of defendants' good faith. That too is a question of fact for a jury.

Finally, it is a little late in the day for defendants to be arguing that a safe, secure investment in land is necessarily highly speculative. (Br. p. 61). The evidence at trial will show that purchasers who bought in reliance on the representation that this was a safe and secure financial investment did not understand that this was a highly speculative investment as the defendants well knew. In short, defendants are raising factual issues which can not be decided by this Court but must await the Government's evidence at trial and a determination by a jury.

The basis of this indictment is that defendants made representations designed to mislead purchasers and failed to disclose material facts within their possession which were necessary to make the statements that were made not false and misleading. Defendants' attempts to take this case away from the jury and dispose of it on pre-trial motions to strike as "surplusage" is wholly without merit and borders on the frivolous. Defendants' motion to strike language in the indictment as surplusage and as inflammatory must be denied.

IV. DEFENDANTS HOWARD FRIEDMAN AND HOFFMAN WERE NOT "AFFIRMATIVELY MISLED" BY ACCEPTANCE OF FILINGS WITH FEDERAL AND STATE REGULATORY AGENCIES AND PROSECUTION OF THIS INDICTMENT DOES NOT VIOLATE DUE PROCESS

A. Introduction

Defendants contend that the indictment must be dismissed because they were "affirmatively misled" into believing their own respresentations and sales practices were truthful and non-fraudulent by the fact that federal and state agencies accepted their property reports and, in some instances, their written advertising material, for filing.

This contention has exactly the same merit as a contention that one who knowingly negotiates a counterfeit bill at a Government financial institution cannot be prosecuted, because he is "affirmatively misled" by his own success in deceiving the person who cashes it.

Neither the federal nor the state filing laws provide that the acceptance of filings submitted constitutes a legally binding determination that the information and purported information contained therein is truthful, complete, and non-fraudulent. It is obvious that if this were the law, filing requirements under the S.E.C. Acts, the Interstate Land Sales Act, and numerous other federal and state regulatory acts, would serve a purpose directly

contrary to that intended by the legislators that enacted them. They would be an impenetrable shield for swindlers of every kind since regulatory agencies could not conceivably assure themselves that the representations contained in these filings were truthful and non-fraudulent, and every swindler who filed the necessary papers would be immune from prosecution.

The law is, of course, to the contrary under the Interstate Land Sales Act, just as it is under the 1933 S.E.C. Act. Swindlers can be prosecuted for fraud in the material filed, and for fraud beyond and in addition to that contained in the filings. It is the persons selling the land who know whether their filings are part of a fraudulent scheme, and the knowledge of these defendants will be proven conclusively.

B. Factual Background

FEDERAL REGULATION

In August of 1968, in response to Congressional concern about fraudulent practices in the sale of subdivided land,* Congress enacted the Interstate Land Sales Full

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* Coffey & Welch, Federal Regulation of Land Sales: Full Disclosure comes Down to Earth, 21 Case W. Res. L. Rev. 5 at pp. 6 to 21 (1969) (hereinafter "Coffey & Welch"); Note, Federal Regulation of Interstate Land Sales: The Limitations of Full Disclosure" 11 Col. J. Law & Soc Prob. 133, 135-43 (1975) (hereinafter "Limitations of Full Disclosure")

Disclosure Act, 15 U.S.C. § 1701 et seq. (hereinafter "the Act") which became effective on April 30, 1969. The Act was fashioned after the Securities Act of 1933. United States v. Del Rio Springs, Inc., 392 F. Supp. 226 (D. Ariz. 1975) aff'd sub. nom., Schenker v. United States _____ F.2d _____, Dkt. No. 75-2487 (9th Cir. Jan. 26, 1976). The Act prohibits a land developer who is not exempt (15 U.S.C. § 1702) from using interstate facilities to sell or lease a lot in any land subdivision unless (1) the developer registers the lot with the Secretary of HUD (hereinafter "the Secretary") by the filing of a Statement of Record (15 U.S.C. § 1704) and (2) the Statement of Record is in effect and a printed property report is furnished to the purchaser in advance of signing any contract. 15 U.S.C. § 1703(a)(1); United States v. Goldberg, _____ F.2d _____, Dkt. No. 75-1229 (2d Cir. Nov. 26, 1975). The Act, and regulations promulgated pursuant to the Act, specify certain information to be included in the Statement of Record, 15 U.S.C. § 1705, 24 C.F.R. § 1710.105 (1975) and in the Property Report, 24 C.F.R. §1710.110 (1975); however, the developer is under a duty to disclose all material facts which are necessary to make statements made in the Statement of Record not misleading. 15 U.S.C. §1706(d). While the Property Report is

based upon information contained in the Statement of Record, 15 U.S.C. §1707, regulations promulgated pursuant to the Act with respect to the Property Report specifically provide that:

> Nothing in this part shall be construed to authorize or approve any use of a Property Report containing any untrue statement of a material fact or omitting to state a material fact required to be stated therein .... 24 C.F.R. §1710.32 (1973).

Since filing requirements are not the full solution to the problem of deception the Act contains anti-fraud provisions, 15 U.S.C. § 1703(a)(2)*, which are virtually

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* 15 U.S.C. §1703(a)(2) provides as follows:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails -
>
> * * *
>
> (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision-
>
> (A) to employ any device, scheme, or artifice to defraud, or
>
> (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

identical to the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77(q); United States v. Del Rio Springs, Inc. supra. 392 F. Supp. at 227. The anti-fraud provisions prohibit fraud in the sale of land notwithstanding the filing of a Statement of Record and delivery of a Property Report.*

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* In the analogous context of the Securities Act this point has been well made:

> At the expense of stating the obvious, we emphasize that compliance with these requirements for delivery of a prospectus or offering circular does not, however license broker dealers or their salesmen to indulge in false or fanciful oral representations to their customers. The anti-fraud provisions of the Securities Exchange Act apply to all representations whether made orally or in writing, during or after the distribution. We have repeatedly held that the making of representations in the sale of securities unsupported by a reasonable basis is contrary to the obligation of fair dealing imposed on brokers and their salesmen by the securities laws. This obligation is not diminished because a prospectus or offering circular containing information specified by the Act and our rules has or is to be delivered. Ross Securities, Inc., 41 SEC 509, 510 (1963).

Most importantly, the Act specifically provides that filing with the Secretary does not constitute approval by the Secretary even if that filing remains in effect. Sections 1716 and 1707(b) state as follows:

15 U.S.C. § 1716:

> The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.* (Emphasis Added)

15 U.S.C. § 1707(b) (Property Reports)

> *** No person may advertise or represent that the Secretary approves or recomends the subdivision or the sale or lease of lots therein....**

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* This provision is virtually identical to 15 U.S.C. §77 w of the Securities Act of 1933.

** Regulations also provide as follows with respect to Property Reports:

> Nothing in this part shall be construed to authorize or approve any use of a Property Report containing any untrue statement of a material fact or omitting to state a material fact required to be stated therein. Nor shall anything in this part be construed to authorize or permit any representation that the Property Report is prepared or approved by Secretary OILSR or the Department of Housing & Urban Development. (emphasis added) 24 C.F.R. § 1710.32 (1973).

Moreover, developers are required to place disclaimers of approval by the Secretary on Property Reports which are given to customers* and as of December, 1973, disclaimers

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* Property Reports were required to recite the following disclaimer from 1969 to December, 1973:

> NOTICE AND DISCLAIMER BY
> OFFICE OF INTERSTATE LAND SALES
> REGISTRATION, U.S. DEPARTMENT
> OF HOUSING AND URBAN DEVELOPMENT
>
> This report is not a recommendation or endorsement of the offering herein by the Office of Interstate Land Sales Registration, nor has that office made an inspection of the property nor passed upon the accuracy or adequacy of this report or any promotional or advertising materials used by the seller. ***
> 34 F.R. 5722 (March 27, 1969. 24 C.F.R. § 1710.110 (1970). (emphasis added)

As of December 1, 1973 the disclaimer notice in the Property Report was amended to emphasize the unlawfulness of representing Federal Government approval of the subdivision (See, Federal Register, Vol. 38, No. 170, Tuesday, September 4, 1973, p. 23870). The new regulation required the following disclaimer:

> NOTICE AND DISCLAIMER BY
> OFFICE OF INTERSTATE LAND SALES
> REGISTRATION, U.S. DEPARTMENT
> OF HOUSING AND URBAN DEVELOPEMENT
>
> The Interstate Land Sales Full Disclosures Act specifically prohibits any representation to the effect that the Federal Government has in any way passed upon the merits of, or given approval to this subdivision, or passed upon the value, if any, of the property.
>
> It is unlawful for anyone to make, or cause to be made to any prospective purchaser, any representations which differ from the statements in this property report. ***
> 38 F.R. 23874, Sept. 4, 1973; 24 C.F.R. 1710.110 (1974).

have been required on all advertising* even though promotional material did not have to be filed with the Secretary.

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* In December, 1973, the following regulations went into effect with respect to disclaimers in advertising material:

> §1715.10
>
> (a) On all printed advertising material and literature used in connection with the sale or lease of lots in a subdivision for which an effective statement of record on file (sic), the following disclaimer statement shall appear at the bottom of the front page thereof or at the bottom of all single page advertisements or newspaper advertismements in type of at least 10 point font.
>
> Obtain the HUD Property Report from developer and read it before signing anything. Hud neither approves the merits of the offering nor the value, if any, of the property.
>
> (b) In lieu of the statement required in paragraph (a), above, in all classified type advertisements not more than 5 inches long and not more than one column in print wide the following statement may be used and shall be set in type of a least 6 point font.
>
> Obtain the HUD Property Report from the developer and read it before singing anything. HUD neither approves the merits of the offering nor the value, if any, of the property. [38 FR 23897, Sept. 4, 1973; 38 FR. 32445, Nov. 26, 1973] 24 C.F.R. §1715.10 (1974).

After holding extensive hearings in 17 cities,* the Office of Interstate Land Sales Regulation (hereinafter "OILSR") revised its regulations, and, as of December 1, 1973, regulations dealing with, inter alia, advertising and sales practices became effective. 24 C.F.R. Part 1715 (1974).

NEW YORK STATE REGULATION:

Article 9-A of the Real Property Law which deals with subdivided land was originally enacted in 1936. That law requires a subdivider to file a sworn statement and Offering Statement with the New York Department of State prior to offering or selling subdivided land in New York State (Real Property Law § 337-a) and further provides that the sale of subdivided land cannot be made unless accompanied or preceded by the delivery to the prospective purchaser of an Offering Statement. (Real Property Law § 337-b.6.) Unlike the federal law, the New York Law also requires that advertisements used to sell subdivided land must be filed with the Department of State. (Real Property Law § 337-b-3.) Article 9-A of the Real Property Law and regulations promulgated pursuant to that law specify certain information to be included in the sworn statement and offering statements (§ 337-a & b); however, the regulations also specifically provide:

* The Limitations of Full Disclosure, 11 Col. J. of Law & Soc. Prob. supra, at pp. 135 n 4, 148, 153.

> "In addition to the information expressly required to be included in the Offering Statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading." 19 N.Y.C.R.R. § 135.14(e). See also, 19 N.Y.C.R.R. § 135.1(b).

The New York statute also contains anti-fraud provisions prohibiting fraud in the sale of land notwithstanding filings with the Department of State. Real Property Law § 338 5.(b); 19 N.Y.C.R.R. § 135.16(c).

Most importantly the Real Property Law specifically provides that filing with the Department of State does not constitute approval by the Deparment. Section 338.8 and 337-b 5 state as follows:

Section 338.8:

> Any person, partnership, corporation, company or association representing in any manner that the state, the department of state, or any officer thereof has recommended or acquiesced in the recommendation of the purchase of any subdivided lands offered for sale or lease, in advertising or offering such subdivided lands offered for sale or lease, shall be guilty of a misdemenor punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year or by both such fine and imprisonment. (emphasis added)

Section 337-b 5.

> The first page of the offering statement and the face of all advertising and literature employed in the sale or lease or offer for sale or lease of subdivided land shall contain a statement in easily readable print that the filing of the verified statement and offering statement with the department of state does not constitute approval of the sale or lease or offer for sale or lease by the department of state or any officer thereof, or that the department of state has in any way passed upon the merits of such offering.* (emphasis added)

As indicated by Section 337-b.5. developers are required to place disclaimers of approval by the Department of State on Offering Statements, which are given to

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* Regulations promulgated pursuant to Article 9-A of the New York, Real Property Law provide:

> (b) No subdivider or his or its agent or agents or employees shall directly or indirectly, advertise, represent or make any claim, oral or written, that the State of New York or the department of state or the Division of Licenses, or any employee, agent or representative of the State of New York or the said department, or division, has approved or recommended or acquiesced in the approval or recommendation of the purchase of any subdivided lands offered for sale or in advertising or offering subdivided lands for sale. (emphasis added). 19 N.Y.C.R.R. §135.13

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customers,* and on advertising.**

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* 19 N.Y.C.R.R. § 135.14(g)

(1) The offering statement shall set forth on the outside front cover page the following statement in capital letters printed in boldface roman type at least as large as 10-point modern type and at least two-point leaded:

THE FILING OF THE STATEMENT AND THIS OFFERING STATEMENT WITH THE DEPARTMENT OF STATE OF THE STATE OF NEW YORK DOES NOT CONSTITUTE APPROVAL OF THE SALE OR LEASE OR OFFER FOR SALE OR LEASE BY THE DEPARTMENT OF STATE OR ANY OFFICER THEREOF OR THAT THE DEPARTMENT OF STATE HAS IN ANY WAY PASSED UPON THE MERITS OF THE OFFERING.

** 19 N.Y.C.R.R. § 135.17

(b) The face of all advertising and literature employed in the sale or lease or offer for sale or lease of subdivided lands shall contain the following statements in easily readable print:

A STATEMENT AND OFFERING STATEMENT HAS BEEN FILED WITH THE DEPARTMENT OF STATE OF THE STATE OF NEW YORK. THE FILING DOES NOT CONSTITUTE APPROVAL OF THE SALE OR LEASE OR OFFER FOR SALE OR LEASE BY THE DEPARTMENT OF STATE OR ANY OFFICER THEREOF OR THAT THE DEPARTMENT OF STATE HAS IN ANY WAY PASSED UPON THE MERITS OF SUCH OFFERING. A COPY OF THE OFFERING STATEMENT IS AVAILABLE, UPON REQUEST, FROM THE SUBDIVIDER, AND IN ADDITION THERETO THE ASSIGNED ADVERTISING NUMBER.

(Footnote continued from previous page)

* * *

(f) In lieu of the statement required in subdivision (b) of this section, in all classified type advertisements not more than five inches long and not more than one column of print wide, the following statement may be used:

OFFERING STATEMENT AVAILABLE FROM SUBDIVIDER FILING WITH NEW YORK DEPARTMENT OF STATE IS NOT APPROVAL OF MERITS OF OFFERING.

C. Argument

Defendants dealt with the administrative agencies through counsel.* Defendants do not contend that they were ignorant of the law** or that the statutes and regulations are impermissibly vague; rather defendants argue that notwithstanding the statutes and regulations they were nonetheless "affirmatively misled" as to the effect of a filing with the regulatory agencies. However, defendants do not articulate who misled them, exactly how they were misled and on what basis they were misled, nor do they show that the alleged reliance was reasonable. United States v. Lansing, 424 F.2d 225 (9th Cir. 1970). Instead defendants argue that simply because the sale of subdivided land was regulated on

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* In selective service cases the Courts have been particularly sympathetic to arguments by registrants that they were affirmatively misled by the local boards as to their rights. The Courts have taken particular note of the fact that the registrants were dealing with the local boards without the aid of counsel. United States v. Grier, 510 F.2d 570 at 576 (9th Cir. 1975); United States v. Timmins, 464 F.2d 385 (9th Cir. 1972) See also, Sundstrom v. United States, 419 U.S. 934, 936 (1974) (cert. denied, Douglas J. dissenting).

** Defendants would be hard pressed to claim this given the disclaimers that had to be placed on all literature.

the state and federal level they were ipso facto "affirmatively misled" by this regulatory scheme into believing that they were not operating fraudulently. Of course defendants choose to overlook or ignore the statutes and regulations which specifically advise them to the contrary. 15 U.S.C. § 1716; § 1707(b); 24 C.F.R. § 1710.110 (1970); 24 C.F.R. § 1710.110 (1974); 24 C.F.R. 1710.32 (1973); 24 C.F.R. 1715.10 (1974) quoted at pages 31 to 35 supra; Real Property Law § 338.8; § 337(b)(5); 19 N.Y.C.R.R. § 135.13; 19 N.Y.C.R.R. § 135.14(g); 19 N.Y.C.R.R. § 135.17 quoted at pages 37 to 40 supra.

Defendants' reliance on United States v. Penn. Chem. Corp., ("PICCO") 411 U.S. 655 (1973) is wholly misplaced. In that case § 13 of the Rivers & Harbors Act of 1899 prohibited the discharge or deposit into navigable waters of "any refuse matter of any kind of description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' However, regulations promulgated pursuant to § 13 of the Act specifically construed § 13 as limited to deposits that affected navigation. PICCO was criminally charged and convicted for depositing industrial refuse matter into the Monongahela River. It was conceded that the matter discharged into the river did not affect navigation.

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PICCO offered to prove at trial that it relied upon the regulations of the Army Corps of Engineers, who were responsible for the administration of the Act, for guidance. The District Court refused PICCO's offer of proof on the ground it was not relevant. The Third Circuit reversed the conviction and the Supreme Court stated: "We agree with the Court of Appeals that PICCO should have been permitted to present relevant evidence to establish this defense;" 411 U.S. at 670 (emphasis added). The Supreme Court held that the District Court erred in refusing to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute. The Supreme Court remanded the case to the District Court noting that the issue whether there was in fact reliance and, if so, whether that reliance was reasonable under the circumstances, were issues to be decided in the first instance by the trial court. 411 U.S. at 675. The Supreme Court did not dismiss the indictment.

In the instant case, the regulations, both federal and state, are wholly consistent with the statutes, 15 U.S.C. §§ 1716, 1707(b); Real Property Law §§ 338.8, 337-b.5; and the regulations could not possibly mislead the defendants. 24 C.F.R. § 1710.110 (1970); 24 C.F.R. § 1710.110 (1974); 24 C.F.R. 1710.32 (1973); 24 C.F.R. 1715.10 (1974) quoted at pages 33 to 35 supra; 19 N.Y.C.R.R. § 135.13; 19 N.Y.C.R.R. § 135.14(g); 19 N.Y.C.R.R. § 135.17 quoted at pages 38-40 supra.

Given the statutes and regulations in the case at bar there can be no valid claim of "affirmative misleading" calling for the dismissal of the indictment as violative of due process. Defendants were on notice that the acceptance of filings with the regulatory agencies did not constitute approval by these agencies. Accordingly, defendants' reliance on Cox v. Louisiana, 379 U.S. 359 (1965), and Raley v. Ohio, 360 U.S. 423 (1959) is also misplaced.

In Cox, a group of civil rights marchers were convicted under a law forbidding picketing "near" a courthouse after they had permission from the chief of police to demonstrate in that area. In Raley, defendants were called before the Ohio Un-American Activities Commission. The chairman of the Commission advised defendants they could claim the privilege against self-incrimination and refuse to answer questions. Defendants were thereafter prosecuted and convicted in a state court for contempt for refusing to answer questions. In both cases the Supreme Court reversed the convictions because to hold otherwise under the circumstances would be to condcne "an indefensible sort of entrapment by the state" and a violation of due process. Cox, supra, 379 U.S. at 571; Raley, supra, 360 U.S. at 425-26.

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Defendants in the instant case have not made out a case of "entrapment" by federal or state regulatory agencies. Defendants' position is simple: this is a regulated industry therefore we must be operating legally. The fallacy of this argument has been brought home all too starkly in recent times not only in the land industry, The Limitations of Full Disclosure, 11 Col. J. of Law and Soc. Prob., supra at pp. 135 n.4; 152 n.118; Note, Interstate Land Sales Regulation: The Case for an Expanded Federal Role, 6 U. of Mich. J. Law Reform 511 (1973); Paulson, The Great Land Hustle (1972), but also in other supposedly "regulated" industries. Regulating Nursing Home Care; The Paper Tiger, Report of the New York State Moreland Act Commission, Oct. 1975.

Moreover, the tack taken by the defendants in brazenly arguing to this Court that their actions were in fact approved by the regulatory agencies brings them squarely within the prohibition of the federal and state statutes forbidding such representations and makes the point charged in the indictment. 15 U.S.C. § 1709(b);* Real Property Law § 338.8, 337-b.5; Indictment para. 18(g) xix), pp. 13-14;

* Section 1716 of Title 15 is limited to making the prohibited representation to a "prospective purchaser."

18(g) xxiv), p. 15-6.

While it is unfortunate that federal and state regulation has long been misused by unscrupulous land developers as evidence that the Government has vouched for the product and the public is safe in investing their money in this land,* defendants are now asking this Court to put its imprimatur on this same misrepresentation.

Of course the fact that false and misleading filings remain in effect and that there is too little enforcement speaks to the limited resources of these regulatory agencies rather than any tacit, let alone

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* Morton Paulson in his book The Great Land Hustle (1972) made the following observation:

"The magnitude of the problem of land sales abuses is not widely known or understood. It is generally believed that most of the trouble ended with the enactment in 1968 of a federal truth-in-land-sales law.

It is true that the law, together with a series of other legal, regulatory, and congressional actions -- including the Truth-in-Lending Act -- has helped to eliminate the most blatent swindles, but it has had relatively little impact on the subtler, slicker, more insidious techniques that, in terms of dollar volume, are the most pernicious of all. Indeed, there is convincing evidence that the land sales law is aiding and abetting some unscrupulous operators; they are, in fact, now able to boast to prospective purchasers that their offerings are registered with the federal government." Paulson, The Great Land Hustle, Page 5.

explicit, approval by them.* Note, Interstate Land Sales Regulation: The Case for an Expanded Federal Role, 6 U. of Mich. J. of Law Reform, 511 at 515-17 (1973), see, United States v. Socony Vacuum Oil Co., 310 U.S. 150, 226 (1940). In any event, federal and state regulators can not waive a violation of law, Socony, Ibid.; Cox v. Louisiana, 379 U.S. 559, 569 (1965), and the courts have held that government silence is not "affirmative assurance that punishment will not attach" and that an absence of prior prosecutions does not constitute "active misleading." United States v. Mann, 517 F.2d 259, 570 (5th Cir. 1975); United States v. Kiger, 297 F.Supp. 339, 342 (S.D.N.Y. 1969).

Defendants operated at their peril, as they well knew, notwithstanding Government regulation. Unfortunately the general public did not know it was operating at its peril in dealing with defendants notwithstanding government regulation. The sad fact is that the government regulators in many

* It has been noted elsewhere that sophisticated business crimes are difficult to detect, expensive to investigate and require enormous resouces to prosecute. Note, Applying Estoppel Principles in Criminal Cases, 78 Yale L.J. 1046 at 1071 (1969). Given the severe limitation of resources, the regulatory agencies of necessity must rely upon land developers themselves to make full disclosure. The Limitations of Full Disclosure, supra, 11 Col. J. of Law & Soc. Prob. 133 (1975).

respects were no different from the general public -- they were equally duped. Here the evidence at trial will show that facts peculiarly within defendants knowledge were not disclosed to regulatory agencies.

To the extent defendants attempt to rely on the eleven letters for a one year period from July, 1969 to July of 1970, from the Administrator of OILSR as approval, the Administrator, as defendants well knew, was not authorized to approve any filings.* 15 U.S.C. § 1716; Boruski v. Division of Corp. Finance of SEC, 321 F.Supp. 1273, 1276 (S.D.N.Y. 1971 Weinfeld, J.); see also, United States v. Socony Vacuum Oil Co., supra, 310 U.S. at 225-26 (1940); United States v. Zenith-Gadley Co., 295 F.2d 634 (2d Cir. 1961). As set forth in the affidavit of Alan J. Kappeler, Assistant Deputy Administrator of OILSR, these 11 letters were form letters sent out by OILRS to all developers notifying them that their filings were effective under the Act. They clearly were not intended to be nor could they be grants of immunity from fraud prosecutions. See, Socony, supra, 310 U.S. at 226.

* There is no statement by these defendants that they even saw those letters nor is there any affidavit by defendants that Jacobs, Persinger & Parker, Esqs., counsel for AMREP ever advised them with respect to these letters or the effect of filings with federal and state regulatory agencies and what that advice, if any, was. For all we know defendants may be claiming that their own lawyers affirmatively mislead them as to the effect of the filing with federal and state regulatory agencies. Cf. Sinclair v. United States, 379 U.S. 263, 299 (1929).

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Defendants also imply that the actions of the Department of State of New York or any other state can bind the federal government. It is not surprising that defendants have not cited any authority in support of this rather unique argument. It is self-evident that the actions of the Department of State of New York can not operate as an estoppel against a federal criminal prosecution, United States v. Sylvanus, 192 F.2d 96, 106 (7 Cir. 1951); Note, Applying Estoppel in Criminal Cases, 78 Yale L.J. supra at 1069.

Sylvanus was a mail fraud prosecution involving a scheme to defraud in connection with the sale of insurance policies. Defendants were charged with misrepresenting their accident and sickness insurance policies in advertisements in magazines and letters sent to prospective customers. In fact, the policies issued were not as advertised but were limited in character, misleading, ambiguous and inconsistent. 192 F.2d at 100. The sale of insurance was regulated by the state. The Court in Sylvanus held:

> Defendants have much to say about regulation and supervision of the insurance company by the Department of Insurance of the State of Illinois. As we have suggested, this case has nothing to do with the regulation of insurance companies. If defendants, in conducting an otherwise legal business, engaged in a fraudulent course of conduct, whether that conduct was or was not approved by the state administrative office is wholly immaterial. What the state said in this respect in its communications to the defendant company was one of the circumstances bearing upon the question of good faith, Hawley v. U.S., 6 Cir. 133 F.2d 966, but not decisive of the ultimate issue.

The Second Circuit in United States v. 93 Court Corp., 350 F.2d 386 (2d Cir. 1965) had before it the question whether a state statute of limitations or doctrine of laches may be utilized to bar an action by the United States to enforce rights of the Reconstruction Finance Corp. The Court held the action could not be barred.

So too the actions of the Office of Interstate Land Sales can not act as a bar to a federal prosecution under the Mail Fraud Statute, Note, Applying Estoppel in Criminal Cases, 78 Yale L.J. supra at 1069; see, United States v. Radio Corp. of Am., 358 U.S. 334 (1959); United States v. Socony, supra, 310 U.S. at 226; Cf. United States v. Maze, 414 U.S. 395, 405-408 (1974) (dissenting opinion, Ch.J. Burger).

Mr. Chief Justice Burger in his dissent in the Maze case noted the importance of the Mail Fraud statute as the "first line of defense" against fraudulent activity and made the following observations which we take the liberty of quoting at length:

> "although inadequate to protect the buying and investing public fully, the mail fraud statute stood in the breach against frauds connected with the burgeoning sale of undeveloped real estate, until Congress could examine the problems of the land sales industry and pass into law the Interstate Land Sales Full Disclosure Act.
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> * * *

> The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct. Mail Fraud counts fill pages of securities fraud indictments even today. Mathews, supra, 39 Geo. Wash. L. Rev. at 911. Despite the pervasive Government regulation of the drug industry, postal fraud statutes still play an important role in controlling the solicitation of mail-order purchases by drug distributors based upon fraudulent misrepresentations.
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> * * *
>
> The Court's decision, then, correct or erroneous, does not mean that the United States ought, in any way, to slacken its prosecutorial efforts under 18 U.S.C. § 1341 against those who would use the mails in schemes to defraud the guileless members of the public with worthless securities, patent medicines, deeds to arid and inaccessible tracts of land, or other empty promises of instant wealth and happiness."

Finally, defendants' theory of estoppel as a result of filing with regulatory agencies is totally inconsistent with the anti-fraud provisions of the federal and state statutes. Both federal and New York statutes have anti-fraud provisions which deal specifically with fraud in the sale of land even though a filing is in effect with the regulatory agency. 15 U.S.C. § 1703(a); Real Property Law § 388.5(b). Acceptance of defendants' argument that a filing is in effect a grant of immunity would mandate a finding

that these anti-fraud provisions are mere surplusage. Nothing could be more inconsistent with the Congressional intent in enacting the Interstate Land Sales Full Disclosure Act. See, Coffey & Welch, supra. While it is not surprising that no Court has been asked to rule that a filing with OILSR precludes a fraud prosecution, it is fair to say the Courts have implicitly rejected this theory. United States v. Goldberg, supra; United States v. Del Rio Springs, Inc., supra; Cf. Boruski v. Division of Corp. Finance of U.S. SEC and EX Com'n., supra, 321 F.Supp. at 1276; Capital Funds, Inc. v. SEC, 348 F.2d 582 (8th Cir. 1965); SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959).

A ruling that a filing which is in effect with OILSR precludes a fraud prosecution would not only have a far-reaching impact in the land sales industry but would have an analogous impact in the securities field since the Interstate Land Sales Full Disclosure Act is fashioned after the Securities Act of 1933. Both Acts have filing requirements and both Acts have anti-fraud provisions. Del Rio Springs, supra. A filing with OILSR or with the SEC is not a grant of immunity from a fraud prosecution.

Defendants motion to dismiss the indictment on the basis of "affirmative misleading" by the regulatory agencies is wholly without merit both factually and legally and should be denied.

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V. THE GOVERNMENT DID NOT AFFIRMATIVELY MISLEAD THE GRAND JURY

Defendants Contention

Defendants Howard Friedman and Hoffman contend on the basis of hearsay affidavits of Messrs. Arkin and Arisohn, counsel for said defendants, that the United States Attorney's Office actively misled the Grand Jury with respect to the existence of evidence favorable to defendants (Br.* p.34) in that (1) the government refused "to alert the Grand Jury to evidence that New York State continually approved company literature, advertising and sales practices" (Br. p. 30) and refused to call a witness before the Grand Jury who would so testify; and (2) the government refused to permit Leonard Geller to testify to various alleged beliefs of his (Br. pp. 29-30) with respect to representations made regarding the land sold at Rio Rancho Estates. Therefore, defendants argue that the Court must examine the Grand Jury minutes to see if the government presented all available evidence to the Grand Jury as to defendants' defense of good faith or in the alternative permit the defendants to examine all of the Grand Jury minutes. As we understand the argument the "exculpatory" evidence of good faith consists of Mr. Geller's alleged beliefs and the fact that defendants filed advertising with the State of New York.

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* Refers to Brief submitted by defendants Howard Friedman Hoffman.

Argument

A charge that the Government affirmatively misled a Grand Jury is a very serious charge indeed. Notwithstanding the seriousness of the charge, counsel for defendants choose to try to establish such a charge on the basis of counsels' hearsay affidavits. The charges as stated in counsels' affidavits are tantamount to a claim that the prosecution suborned perjury in the Grand Jury by Leonard Geller and withheld allegedly material evidence. Yet curiously we do not have Mr. Geller's sworn affidavit that he perjured himself in the Grand Jury. We only have Mr. Arisohn's affidavit in which he says, in effect, that Mr. Geller perjured himself in the Grand Jury. Mr. Arisohn is asking this court to rely on his hearsay third-hand account of what Mr. Geller allegedly told him took place in the United States Attorney's office and in the Grand Jury to establish a charge of subornation of perjury by the Government.

At the time Mr. Geller spoke to the Government and testified in the Grand Jury he was an employee of Mr. Arisohn's clients, Messrs. Howard Friedman, President of AMREP, and Hoffman, Senior Vice-President. When Mr. Geller spoke to Mr. Arisohn on November 11, 1975, he was still an employee. Sometime thereafter Mr. Geller was fired. Perhaps Mr. Geller was not being truthful with Mr. Arisohn because he wanted to stay in the good graces of his then employer and keep his job.

Mr. Arisohn also paraphrases and characterizes conversations he had with John H. Doyle, III, attorney for Mr. Geller. At the request of the Government Mr. Doyle has submitted an affidavit. That affidavit makes it very clear that the Government was only interested in having Leonard Geller testify truthfully. Moreover, Mr. Doyle states in his affidavit that Mr. Geller has assured him that the totality of his Grand Jury testimony was truthful and correct. There is absolutely no substance to Messrs. Arkin and Arisohn's charges of subornation of perjury by the Government. Thus, defendants reliance on cases such as United States v. Basurto, supra, is wholly mispleaded. See pp.106-108 infra.

Finally, we do not have an affidavit from the unnamed senior attorney referred to in Mr. Arkin's affidavit who allegedly informed the Government, inter alia, of his "expert" view that the price of land which is subdivided is irrelevant and need not be disclosed to a purchaser. Mr. Arkin contends not putting this witness before the Grand Jury constitutes affirmative misleading. Obviously, not everyone the Government talks to need be put before the Grand Jury. In any event, as Mr. Arkin well knows, all of the information which defendants allege was "exculpatory" was put before the Grand Jury through the testimony of Mr. Friend, the Senior Vice-President and General Counsel, who testified for some ten days. Mr. Friend was attempting not only to exculpate himself but also AMREP. Mr. Friend was given every opportunity to explain his position and the Company's position and he did so. The Government is not permitted under Fed. R. Crim. P. 6(e) to disclose who else appeared in the Grand Jury and gave testimony on these subjects.

Nor was the Grand Jury misled with respect to New York law. The New York state statutes and regulations are discussed, supra, and their meanings are plain to everyone but defendants' counsel. The indictment is accurate as drafted and the Grand Jury was not misled.

In sum, defendants have made no factual showing much less any compelling need which would necessitate this Court's reviewing the minutes of the Grand Jury, or permitting defendants to do so. The indictment herein is valid on its face and was returned by a duly constituted Grand Jury. Therefore review by the defendants or the Court is not appropriate.

In United States v. Cummings, 49 F.R.D. 160, 161 (S.D.N.Y. 1969), Judge Mansfield held:

> In the absence of any showing of particularized need, or a gross and prejudicial irregularity influencing the grand jury, or some similar compelling reason, defendant's motion to have the court inspect the grand jury minutes must be denied. An indictment returned by a duly constituted grand jury is sufficient if it appears valid on its face. Costello v. United States, 350 U.S. 359 (1956). There is no evidence that the indictment was obtained on the basis of insufficient testimony or hearsay evidence, and in any event such an occurrence would not necessarily justify dismissal of the indictment, United States v. Covello, 410 F. 2d 536, 546 (2d Cir. 1969).

So too in United States v. Callahan, 300 F. Supp. 519, 523 (S.D.N.Y. 1969), Judge Motley held:

> Once it appears that the indictment is valid on it face and was returned by a

> legally constituted and unbiased grand jury, the indictment is sufficient to call for a trial on the merits, and allegations by defendant that the grand jury had no competent evidence to connect him with the crime charged are insufficient under Rule 6(e), Fed. R. Crim. P. to give defendant a right to grand jury minutes. (citations omitted).

The secrecy of the Grand Jury proceedings is governed by Rule 6(e) of the Federal Rules of Criminal Procedure. That rule allows disclosure in only three situtations, none of which is present in the instant case. As Judge Weinfeld noted in United States v. Kahaner, supra, 203 F. Supp. at 86:

> (T)he long established policy of the Federal courts, one particularly entrenched in this District, is to preserve the secrecy of Grand Jury proceedings. This policy requires that disclosure of Grand Jury testimony should rarely be granted, and then only under compelling circumstances (footnotes omitted).

See also, United States v. Elliott, 266 F. Supp. 318, 327 (S.D. N.Y. 1967) and cases cited therein.

Defendants' motion to have the court or in the alternative the defendants review the minutes of the Grand Jury should be denied.

VI. THE GRAND JURY DID NOT VIOLATE THE ATTORNEY-CLIENT PRIVILEGE OF ANY DEFENDANT.

INTRODUCTION

The defendants Carity and Hoffman move to dismiss the indictment or in the alternative for the suppression of evidence based upon the Grand Jury's alleged receipt of information violative of the attorney-client privilege. The other defendants, including the corporations adopt the Carity-Hoffman motion "as applicable". These motions are without any legal or factual basis.

Perhaps the grossest inaccuracy in the Carity-Hoffman supporting memorandum of law is the assertion that "[t]here is no doubt that the privilege was violated during the grand jury investigation". (p. 9). The Government will show that to the contrary:

1). The defendants have failed totally to meet the burden of establishing any breach of attorney-client or related privileges during the Grand Jury investigation;

2). The conduct of the Grand Jury and the Government in examining the defendant Friend, an attorney, was proper and did not violate any rights of the defendants;

3). The non-corporate defendants have no standing to complain of the Grand Jury's questioning the corporation attorney, the defendant Friend;

4). Any communications between the defendant Friend, as an attorney, and his client who now is a defendant herein, took place during and in furtherance of the criminal acts alleged in the indictment and are therefore not privileged.

5). The defendants are not entitled to a dismissal of the indictment or the suppression of evidence.

The defendants' motions seek unprecedented relief based upon the flimsiest of factual showings. Their complaints about evidence the Government received from the co-defendant Friend relate to the most inconsequential and trivial items. As to that evidence, these motions are somewhat like the crash of thunder and bolt of lightning which appear with such ferocity as if to foretell a nasty storm; yet when the sound and light show is over, there is only a single drop of rain.

The individual defendants, who in fact have no standing to make these attorney-client motions, consented to the receipt of the bulk of the items they now wish to contest. Moreover, if and when this evidence is offered at trial, the Court can rule on its admissibility, as courts have routinely done in similar situations. At the time this becomes an issue at trial, it will be abundantly clear that these items are admissible,

because the communications were made during and in furtherance of the scheme to defraud and therefore are not privileged. Finally, as will be shown, there is no authority for the relief which these defendants seek.

A. THE DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF ESTABLISHING THE EXISTENCE AND BREACH OF ANY ATTORNEY-CLIENT PRIVILEGES.

A proper analysis of the scope, purposes and appropriate application of the attorney-client privilege discloses that the defendants here cannot invoke its protection from this indictment nor retrieve evidence from the Government. The defendants' papers are notably lacking of any discussion of the proper invocation of the privilege, and specifically lacking any authority for the relief they presently seek.

The Government does not dispute that confidental communications from a client to an attorney, made in the course of that professional relationship and concerning the subject matter of the attorney's employment as legal counselor are privileged from disclosure. As noted by this Court in one of the leading cases, the privilege is grounded upon the theory that such protection is necessary "to encourage clients to make the fullest disclosures to their own attorneys, to enable the latter to properly advise the clients." In re Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), aff'd, Colton

v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); 8 Wigmore, Evidence §2291 (McNaughton Rev. 1961).

However, to state the principle and its purposes is to merely define the problem at hand and not provide the answers. The privilege is a common law testimonial, not constitutional one,* which conflicts with equally important values of our legal system, and therefore, as with constitutional privileges, must not be "expansively construed." United States v. Nixon, 418 U.S. 683, 710 & n. 18 (1974).

The Second Circuit, per Judge Friendly, has warned that:

> The privilege, stands in derogation of the public's right to every man's evidence; 8 Wigmore, supra, §2192, at 70, and as "an obstacle to the investigation of the truth," id., §2291, at 554; thus as Wigmore has said, "It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." In re Horowitz, 482 F. 2d 72, 81 (2d Cir. 1973) (emphasis added).**

No defendant has an attorney-client privilege to claim, unless all of the following requirements are met:

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* See United States v. Rosner, 485 F.2d 1213, 1227 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Mackey, ___ F. Supp. ___, 75 Cr. 468 (E.D.N.Y. Nov. 14, 1975), slip op. at 18.

** See Branzburg v. Hayes, 408 U.S. 665, 668 (1972) ; Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J.).

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) Wyzanski, J.)

Colton v. United States, supra, 306 F.2d at 637.*

It has long been the law of this Circuit that to place at issue the alleged infringement of constitutional guarantees or to require a hearing thereon, there must be some factual allegations in a moving affidavit based upon personal knowledge of the defendant or his counsel, as to how these guarantees were infringed. Unless there are sufficeint allegations based upon personal knowledge, there is no factual issue to be resolved, and the motions must be denied. United States v. Culotta, 413 F.2d 1343, 1345

* Wigmore's formulation has also been referred to by the Second Circuit, United States v. Kovel, 296 F.2d 918, 921 (1961), and is but a slight variation of Judge Wyzanski's oft-quoted definition.

(2d Cir.), cert. denied, 396 U.S. 1019 (1970); United States v. Gillatte, 383 F.2d 843, 846-49 (2d Cir. 1967). In United States v. Pardo-Bolland, 229 F. Supp. 473, 475 (S.D.N.Y. 1964), aff'd, 348 F.2d 316 (2d Cir.), cert. denied, 382 U.S. 944 (1965), defense counsel moving solely on the basis of a hearsay affidavit, sought to suppress wiretap information allegedly obtained in violation of the Fourth Amendment. The Court, in denying the application without a hearing, stated:

> The burden is on the defendant to establish that his Fourth Amendment rights have been infringed. That burden requires allegations of evidentiary facts upon personnal knowledge, or at least disclosure of the sources of the deponent's information and the grounds for his belief, to support a demand for a hearing. United States v. Cassanova, supra, 213 F. Supp. at 657 n.10. Otherwise, the government's case would be prematurely exposed and the court burdened with hearing nothing but a stark fishing expedition by the defendant. Indeed, this phase of the motion is so ill founded that we conclude that it was made in bad faith for the sole purpose of gaining a preview of the government's evidence.

See also United States v. Gardner, 308 F. Supp. 425, 427 (S.D.N.Y. 1969); United States v. Capra, 73 Cr. 460 (S.D.N.Y. Sept. 11, 1973) (decision by Judge Frankel denying defendant Massina's motion for a Simmons hearing supported only by a hearsay affidavit by defense counsel).

The only facts on the record before the Court offered by the defendants are based upon attorneys' affidavits wholly lacking in personal knowledge. In view of the lack of any evidence submitted by affidavits based upon personal knowledge to support the allegations, the defendants' motions to suppress and to dismiss should be denied.

This principle applies with special force where a breach of the attorney-client privilege is claimed. The Second Circuit has repeatedly held that a person claiming the attorney-client privilege has the burden of establishing all of these essential elements. The Government need not show anything, let alone the absence of one of these elements. United States v. Stern, 511 F.2d 1364 (2d Cir. 1975); In re Bonanno, 344 F.2d 830 (2d Cir. 1965); Colton v. United States, supra; and United States v. Kovel, supra. In affirming the conclusion that the claimant had failed to meet the burden, the Court has cautioned:

> That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiring into the existence of the relationship, and any previous claims could never be exposed. In re Bonanno, supra, 344 F.2d at 833.

The importance of both confining the privilege to only those communications deserving its protection and requiring the claimant to prove each element thereof can readily be seen from even a brief review of what the privilege does not cover. First, communications from client to attorney not intended to be privileged are unprotected. For example, when they are intended by the client to be revealed to third parties, Colton v. United States, supra, and United States v. Tellier, 255 F.2d 441 (2d Cir. 1958); or if third persons are present at the time of a communication by the client or if it is circulated among third parties, United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972); Doe v. A. Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), aff'd sub nom. Hall v. A. Corp., 353 F.2d 1375 (2d Cir. 1972).

The existence of an attorney-client relationship does not itself entitle the client to a presumption of confidentiality.

> ... it is vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence In re Horowitz, supra, 482 F.2d at 81-82 (emphasis supplied).

"The moment confidence ceases... privileges ceases." 8 Wigmore, Evidence § 2311. Intentions alone are not necessarily enough to establish privilege. United States v. Stern, supra (no privilege even where defendant thought relationship

existed). While a corporation is entitled to claim this privilege, it must prove all its elements including confidentiality.* In re Horowitz, supra, 482 F.2d at 82, citing with approval United States v. Kelsey - Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954). For example, where corporations mingle confidential and routine documents the privilege may be lost. "If a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality." Id. For example, documents prepared for simultaneous review by a corporation's legal and non-legal personnel are not privileged. United States v. I.B.M., 66 F.R.D. 206 (S.D.N.Y. 1974).

Second, statements, correspondence and documents acquired by the lawyer from third parties are not protected. Colton v. United States, supra ; United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932 (1972); Giordani v. Hoffman, 278 F.Supp. 886, 889 (E.D. Penn. 1968). "Communications made to an attorney in the course of his professional employment by persons other than the client or his agent are not privileged." United States v. Goldfarb, 328 F. 2d 280, 282 (6th Cir. 1964). In the

* See The Lawyer - Client Privilege: Its application to Corporations, the Rule of Ethics and its Possible Curtailment, 56 Nw. U.L. Rev. 235, 248-49 (1961)

corporate context every employee is not the client; some are only witnesses. In the very case relied on by defendants, City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D.Pa. 1962), the court noted that unless the employee making the communication is in a position to control or take part in a decision by the corporation on the advice of the attorney, the privilege does not attach. Id. at 485.

An equally important, but perhaps less frequently recalled corrolary of these propositions is the rule that a "... communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney." United States v. Silverman, 430 F.2d 106, 122 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971); United States v. I.B.M., supra. In Silverman the Government was able to obtain the advice the attorney gave to his client based upon the attorney's review of and facts gleaned from, pre-existing and public union records. See Colton v. United States, supra, 306 F.2d at 639 (turning pre-existing documents over to lawyer does not create a privilege). Judge Wyzanski summed this up well by reminding that if the legal advice given to a corporate client is given:

> upon the basis of facts disclosed to the attorney by a person outside the organization of defendant and its affiliates the communication is not privileged. Thus, for example, there is no privilege for so much of a lawyer's letter, report or opinion as relates to a fact gleaned from a witness. . .; or a person with whom defendant has business relations.... or a public document such as a patent...; or a judicial opinion.... United States v. United Shoe Mach. Corp., supra, 89 F. Supp at 359 (citations ommitted).

Finally, the request by the client and the lawyer's response must involve legal advice for the privilege to obtain. United States v. Kovel, supra, 296 F.2d at 922. Lawyers often have relationships with clients that involve purely nonlegal advice or where the nonlegal advice is more frequent or dominates the legal. In such instances no privilege attaches to the communication. United States v. Tratner, 511 F.2d 248 (7th Cir. 1975) (must separate business from legal advice); United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973) (routine business correspondence); United States v. Kovel, supra, 246 F.2d at 922 (dicta: accounting services or advice); In Re Grand Jury Subpoena Duces Tecum, 391 F.Supp. 1029 (S.D.N.Y. 1975) (business advice); In Re Kinoy, 326 F. Supp.400 (.S.D.N.Y. 1970) (information obtained in capacity as father not necessarily as attorney).

When the need for business advice of a corporate department overshadows any legal service provided, no privilege obtains. See United States v. United Shoe Mach. Corp., supra, 89 F. Supp. at 360-61, and examples therein.

In a corporate context, the importance and need for nonlegal advice may outweigh any inhibition which may result from disclosure; if so, the principle underlying the privilege is not served by applying the privilege.

> There are a number of other reasons why the privilege often does not operate so as to encourage corporate communications to counsel. The privilege applies to protect only those communications prompted by the need for advice on legal matters; no privilege is available if the firm seeks only nonlegal advice. Frequently the motives for the communication are mixed: the company wants its lawyer to gather information to aid him in giving legal advice, and it has more general business purposes for having the information collected. When, as is often the case, the nonlegal reasons for communicating the information to the lawyer are strong enough that the communication would occur regardless of privilege, the privilege cannot be justified as an inducement to communication. Attorney-client Privilege for Corporte Clients: the Control Group Test, 84 Harv. L. Rev. 424, 428 (1970).

In light of the burden imposed on the defendants to establish that their respective privileges were violated, the paucity of their factual showing is overwhelming. No person with first hand personal knowledge of the alleged privileged communications, let alone the holder thereof, has produced an affidavit setting forth any of the pertinent factual matters necessary to establish the privilege. For example, the record is silent on the following facts:

1. precise communication complained of
2. conveyor and recipients
3. who else was present
4. intentions with respect to confidentiality

5. affirmative efforts to maintain confidentiality

6. subsequent location of documents

7. subsequent recipients of communications

8. nature of communication

9. purpose of communication

10. nature of advice actually given by recipient

The only affidavit submitted on behalf of the attorney-client dismissal and suppression motions is that of Peter Fleming, current counsel for Messrs. Chester Carity and Daniel Friedman.* With all due respect, Mr. Fleming by use of a hearsay affidavit is in no position to establish factually a privilege for his clients or any one else. Therefore, as a matter of law the application for such relief by all defendants must fail.

B. THE INDIVIDUAL DEFENDANTS HAVE NO STANDING TO CHALLENGE THE INDICTMENT OR EVIDENCE ON THE BASIS OF THEIR CORPORATE EMPLOYER'S ATTORNEY-CLIENT PRIVILEGE.

The application for relief by these defendants grounded upon violations of attorney-client privilege overlooks one fundamental and simple point. The attorney-client privilege is a personal privilege and cannot be loaned out

* Counsel for AMREP has submitted the affidavit of Mr. Gallantz which purports to recite breaches of AMREP's privilege. We note this affidavit is offered solely on behalf of AMREP's motion for severance and is nowhere explicitly adopted for the instant motions. While the Gallantz affidavit is discussed in more detail at p. 84 infra, it adds nothing of significance to the Fleming affidavit and is equally deficient in its proof that the privilege existed and was violated.

as an umbrella to co-defendants to protect them. For example, defendant Carity's attorney-client privilege is his alone; he cannot share it with any other defendant. Assuming arguendo a breach of one defendant's attorney-client privilege, no other defendant is entitled to any relief from that breach. In simple language applicable to these motions, any breach of the corporation's attorney-client privileged communications to their attorney, the defendant Friend, has absolutely no bearing on the individual co-defendants and their right to any relief on account thereof. They have no standing to make any claim for relief.

Any formulation of the privilege compels this result. As required by Judge Wysanski's definition,"(1) the asserted holder of the privilege is or sought to become a client; ... and (4) the privilege has been (a) claimed and (b) not waived by the client." United States v. United Shoe Mach. Corp., supra, 89 F.Supp. at 358-59. (emphasis added). Courts have not hesitated to so limit the invocation of the privilege to the client himself. We submit that any case on the attorney-client privilege assumes this proposition before further analysis. On occasion, we are reminded explicitly that such an elemental proposition governs all assertions of the privilege. United States v. Silverman, supra, 430 F.2d at 122; In re Grand Jury Subpoena Duces Tecum, supra, 391 F.Supp. at 1034; see United States v. Bartlett, supra.

In Silverman the Court affirmed the conviction based in part upon evidence of an attorney's report to a union on the condition of the union's documents. The evidence was received despite objections by the individual defendant, the president of the union, that his attorney-client privilege would be violated. In holding that the attorney's report contained no privileged information from the client, the Court suggested an alternative but unnecessary basis for permitting the report into evidence.

> Nor do we need to make a finding, which the trial court failed to make as to whether Friedland was the attorney of Local 810 and not of Silverman, therefore leaving Silverman without standing to assert error in the ruling by the trial judge. 8 Wigmore, Evidence § 2321 (McNaughton rev. ed. 1961); McCormick, Evidence § 96 at 196 (1954) (emphasis added).

Id. at 122. Section 2321 of Wigmore, relied on by the Silverman court, leaves no doubt that it is hornbook law that the privilege can only be asserted "as client, not as party to the cause." 8 Wigmore, Evidence §2321 at 679 (McNaughton rev. ed. 1961).

In United States v. Bartlett, supra, the Eighth Circuit, as alternative basis for affirming a conviction based in part upon the testimony of the corporation's attorney against the corporation's president, held that the "defendant has failed to establish that the attorney-client relationship

existed between him and Parker at the time of the alleged disclosure. The relationship established was between the attorney and the corporation." Id. at 704. Accord, Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972) (appellant had no standing because attorney was corporation's not his); Federal Savings & Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 547-48 (D. Nev. 1972); In Re Grand Jury Subpoena Duces Tecum, supra, 391 F. Supp. at 1034 ("Vesco cannot assert the attorney-client privilege as to matters involving the affairs of the ICC, embracing his role or activities as an ICC officer or director"); In re King Resources Co. Securities Litigation, _____ F. Supp. _____, Civ. Action No. C 3873 (D.Colo. Jan. 31, 1975) ("persons who served as officers or directors of the before listed corporations may not avail themselves of the privilege as to any legal advice received by them in their official corporate capacities") (slip. op. at 12).

Of course, since the privilege is the client's alone, even though an attorney has an obligation to plead it on behalf of his client*, he has no standing to use it for his own protection. It is "now never disputed" that it is not the attorney's privilege. 8 Wigmore, Evidence, supra, § 2321 at 629.

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* See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967).

It follows that here the individual defendants have no standing to challenge the indictment or the Government's evidence on the basis of any attorney-client relationship between the defendant Friend and any of the defendant corporations. For this reason alone, all individual motions grounded on attorney-client privilege must be denied.

C. THE GRAND JURY EXAMINATION OF THE DEFENDANT FRIEND WAS CONDUCTED PROPERLY AND DID NOT VIOLATE ANY ATTORNEY-CLIENT PRIVILEGE.

As shown, above, the defendants have totally failed to establish an attorney-client privilege for any specific communication received by the Grand Jury, and for this reason alone their motions should be denied. Friend, moreover, did not in fact breach the attorney-client privilege, nor did the Government invite such a breach.

A review of the examination of Friend shows that the Government fastidiously warned Friend at all opportunities that he should not violate any attorney-client privileges. Hynes Aff. ¶ 10. For example, Friend was instructed on July 24, 1975:

> Q. When you refer to the attorney-client privilege, I am sure what you are referring to is that any confidential communication by a client to an attorney seeking legal advice, and that is the general guidelines of the attorney-client privilege; that the client must be seeking, giving the communication in confidence to an attorney for the purpose of receiving legal advice.

A. And the converse is true, too as I understand that the lawyer must be giving legal advice and confidence to the client.

Q. Yes.

A. I also want to mention the fact that there is a counsel for the defense.

As you know, I have been working on this matter with other lawyers for the past year and a half and as such, I have become privy to all kinds of information that the lawyers have been working on and I don't feel that it would be fair or morally correct for me, despite my desire to reveal everything to you to convise. (sic)

The rules known as the counsel for the defense, I cannot unless, of course, a judge orders me to do so. I would certainly be unable to reveal any confidential discussion I had with other lawyers in this case.

Q. Mr. Friend, I will make it very clear on the record that I am not asking you to disclose any confidential conversations you had with other lawyers in this case in connection with the preparation of a possible defense for clients that they represent.

A. I am sure you won't do that, Ms. Hynes.

(Tr. pp. 5-6)

Friend was an experienced attorney, p. 165 infra, who was represented by counsel throughout his Grand Jury testimony. He, more than any single person, was in a position to know what information was arguably privileged. The prosecutor reminded Friend of the privilege and clearly told

him not to violate it. Nothing else could possibly have been done. To suggest that the prosecutor's conduct was improper and threatening is the kind of unsubstantiated overreaching which pervades defendants' motion papers.

Moreover, even a superficial analysis of the hearsay claims contained in the Fleming affidavit discloses that the items specifically claimed as privileged are not privileged as a matter of law. Taking the defendants' claim at face value, out of approximately 1250 pages of Grand Jury testimony by the defendant Friend, the only specific claim before the Court is that on two occasions Friend disclosed confidential communications (Fleming Aff. ¶¶ 10 and 13-15).* Giving the defendants every benefit of the doubt on this question, there are also six claims of violations of the corporate privilege contained in the Gallantz affidavit submitted only on behalf of the motion for severance. As seen below, the defendants have really gone to the bottom of the barrel to try to make out a claim for attorney-client privilege.

The first complaint is that the Grand Jury learned through Friend that the defendants were debriefing witnesses. The Government fails to see any legal significance to such a claim. In the first place, as the Hynes affidavit makes clear (¶11), the debriefing often took place outside the Grand

* As noted in the Hynes affidavit, the defendants began to receive this testimony from the Government on December 12, 1975.

Jury room in plain view of the Grand Jury members as they went in and out of their room. Second, defendants show no prejudice from such information coming to the Grand Jury's attention, quite possibly we suggest, because there could be no prejudice therefrom. Finally, defendants cite no authority even remotely suggesting it would be improper for the Grand Jury to have such information. This is understandable, since it would be perfectly proper for the Grand Jury to ask each witness directly whether he had consulted with previous witnesses, and, what if anything previous witnesses had told the witness either about substantive issues or about the questions being asked by the Grand Jury.

Defendants' protest, that Friend conveyed vague information about the depth of water, which information he learned from debriefings of Grand Jury witness Neil Godwin (Fleming Aff. ¶10), is equally frivolous. Put simply, Friend told the Grand Jury that he learned what Neil Godwin told the Grand Jury. That information was already given the Grand Jury by Godwin himself. This hardly rises to the level of breaching an attorney-client privilege or councils of defense.

First, Godwin was a former employee of AMREP and had no attorney-client relationship with any defendant. Since he was repeating what he told the Grand Jury, it was not conceivably confidential. As made crystal clear at p. 66 supra, such information gained from a witness even

though learned from one's attorney or joint counsel is not privileged. See, e.g., United States v. Silverman, supra; Colton v. United States, supra; United States v. United Shoe Mach. Corp., supra, 89 F. Supp. at 359. Second, the Godwin Grand Jury testimony took place in July, 1975, six months after Friend and his codefendants learned that Friend was in the same position as the other principal corporate officers. Hynes Aff. ¶ 14. Friend, as the others did, continued all of his corporate activities, and his codefendants continued to disclose such factual information to him, apparently even after he testified before the Grand Jury.

As set forth in detail at pp. 95-97 infra, no Sixth Amendment right to counsel attaches at the stage of Grand Jury investigative proceedings. Even if a strained reading of the laws of the attorney-client privilege were to construe as privileged the communication of facts learned from other Grand Jury witness' testimony, the cases make clear that under these circumstances all defendants risked subsequent disclosure by conveying information to co-defendants. See p. 109 infra. Finally, as a participant in the fraud charged in this indictment, communications to Friend by co-defendants are excepted from protection by attorney-client privileges. See. p. 118 infra.

Mr. Fleming's only other specific claim that Friend violated someone's attorney-client privilege relates to documents Friend eventually produced for the Grand Jury

(Fleming Aff. ¶ 15). Defendants claim that these documents were improperly produced in violation of attorney-client privileges, and as a result of some combination of threats and trickery by the prosecution. This is not merely frivolous, but worse, a preposterous and gross attempt to deceive and mislead this Court. It is so absurd, that Friend does not even raise it on his own behalf.

Immediately preceding the September 11, 1975, Friend testimony quoted in the Fleming Affidavit, the following questions and answers took place:

> Q. Mr. Friend, you have from time to time, referred to memoranda which you say show that you took steps to correct certain sales practices.
>
> A. And advised the client, yes, absolutely.
>
> Q. You have also mentioned that these, some, of these were privileged?
>
> A. Most of them were privileged.
>
> Q. Most of them were privileged?
>
> A. Yes.

The only thing occurring at this point in Friend's testimony is that Friend first tells the Grand Jury that he believes certain company documents exist which will show his innocence, and then Ms. Hynes informs him that 1) he should either turn over the document or 2) if it is privileged seek the permission of the Court to produce the documents. In other words, the Government was responding to a deliberate ploy of Friend's

whereby he claimed: "I am innocent and I would prove it except that I am being prevented from doing so by this terrible privilege situation." The Government had no choice but to call this bluff.* Judge Duffy recognized in his subsequent opinion concerning these documents that Friend was only "invited ... to produce any documents which Mr. Friend believes would exculpate him." Op. at 1-2.

Thereafter, Friend followed the Government's suggestion and filed a motion, which was heard by Judge Duffy, to turn over about 75 documents which he claimed showed his innocence. Transcript of Proceedings before Judge Duffy, at 2. (hereinafter referred to as D. Tr.) The Corporation was represented by Jacobs, Persinger and Parker, Ms. Dacey appearing. At this hearing, Mr. Arkin represented the corporate officers Howard Friedman, Dan Friedman, Henry Hoffman and Chester Carity who are now defendants,** (Hynes Aff. ¶ 15) and on their behalf he waived any objection to the Grand Jury receiving the documents. Although the defendants have intentionally or mistakenly overlooked this essential point, whatever can be said about these documents, this waiver eliminates their right to press the issue now.

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* It is ironic that throughout a substantial part of his motion papers, Mr. Arkin accuses the Government of not taking steps to protect the targets of the investigation by giving the Grand Jury all available exculpatory information.

** Arkin stated: "I represent... the president and the executive vice president, et cetera, of the AMREP Corporation" (D. Tr. 4); " I have been representing the principals of the corporation since March or April of 1974 in this long and ongoing investigation ..." (D.Tr. 5).

That there was such a waiver cannot be seriously contested. Mr. Arkin told Judge Duffy: "we have no objection to these documents going in." (D. Tr. 4, line 23); ". . . we waive the attorney-client privilege to this very limited extent as to these particular documents ... [not to all communications]." (D. Tr. 5, lines 20). Finally, Mr. Arkin told Judge Duffy: "We think these documents would be helpful to the grand jury and helpful to my client, the corporation, as a whole." (D. Tr. at 9, lines 14-16).* If these statements are not absolute waivers of any objections, the Government cannot conceive of anything more that could be required.

The Corporation's position is equally weak. First, the documents turned over to the Government by Friend were marked as G.J. Exh. JJ, but were not marked to indicate which were 1) claimed to be privileged; 2) already held to be privileged; 3) not claimed to be privileged; or 4) claimed to be privileged but the claim was denied previously. The Government has no way to categorize the documents in light of defendants failure to do in their instant motions. As to category one, the corporation failed to present any facts to Judge Duffy other than the documents themselves, and accordingly although "noting" their position, Judge Duffy did not hold them privileged. Instead he turned them over to the Grand Jury and the corporation did not appeal.

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* Whether this was a slip of the tongue by Mr. Arkin is unclear. Since he represented all of the principal corporate officers, except for Friend, and they thought it would be helpful for the documents to go to the Grand Jury, it is hard to see what difference there could be from the corporation's interests.

Similarly, here the corporation has not only failed to pinpoint which documents it claims are privileged but has failed to have anyone, let alone an appropriate corporate official with personal knowledge, articulate any facts to meet the burden of establishing a privilege for these documents. Accordingly, this Court must reject the instant applications in toto. In Re Horowitz, supra; Colton v. United States, supra.

In addition, since Judge Duffy has permitted the Grand Jury access to these documents for Friend to defend himself, the corporation cannot complain that either the Government or Grand Jury violated the constitutional rights of the corporation. The attorney-client privilege is not a constitutional right, but an evidentiary privilege subject to various exceptions which serve the public interest.* One of the exceptions is for commissions of a crime. p. 118 infra. As Judge Duffy held, another is to permit the attorney to defend himself. Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974); Marco v. Dulles, 169 F. Supp. 622, 631 (S.D.N.Y. 1959). Once permiting judicially authorized disclosure for Mr. Friend's defense, it cannot be said that receipt of the documents was a violation of law or the constitution. It would be equally absurd to suggest that the indictment was

* As made clear at p. 95 infra, since no Sixth Amendment right to counsel attaches at the Grand Jury, the corporation cannot bootstrap their limited attorney-client privilege into a constitutional status.

improperly returned or otherwise defective, or that the Government was guilty of misconduct.

Finally in determining the limits of such a common law privilege, the Court must necessarily look to its underlying purpose: the encouragement to clients that they can confide in their legal counselor without fear of disclosure. As we have already shown, this is not an absolute assurance. The Government suggests that clients' willingness to confide in lawyers will be unaffected by the knowledge that the lawyer will be able to disclose the communication in order to defend himself from criminal charges, and therefore once communications are disclosed for that purpose the privilege has been legitimately broken and the information can no longer be confidential as to anyone.

In summary, Friend obtained a judicial imprimatur for providing the documents to the Grand Jury, after an adversary hearing was conducted with attorneys for all moving defendants pariticipating. No appeal was taken from Judge Duffy's final order and therefore defendants should be bound by that ruling. Of course assuming arguendo the documents are privileged, even if one assumes there was no obligation to appeal, and that Judge Duffy's ruling was wrong or that the Grand Jury could only receive the documents and consider them for their exculpatory nature as to Friend, it is a leap of both logic and faith to conclude that there was Government misconduct or an improperly returned indictment.

The cases are legion that where evidence received by a Grand Jury which subsequently is determined to be illegally obtained, the indictment is not tainted but still requires the defendant to stand trial. See p. 100 infra.

Finally, as will be shown hereinafter, a completely alternative ground for rejecting the defendants' claims based on these documents is that their disclosure is permitted under the commission of a crime exception to the privilege. Infra at 118. In fact, at the appropriate time all documents heretofore held privileged, are properly disclosable under a Government trial subpoena, since the crime exception would defeat the claim of privilege.

The Gallantz affidavit was offered only in support of the corporation's motion to sever the defendant Friend, not on behalf of the corporation's claim that its attorney-client privilege was violated in the Grand Jury. Nevertheless, in response thereto and giving the defendants every benefit of the doubt, the Government contends that each of the arguments we make against the claims of the Fleming affidavit disposes of the additional claims implied by the Gallantz affidavit: (1) there has be no showing meeting defendants' burden that the testimony breached a privileged communication; (2) the communications are excepted from privilege because they were made during and in furtherance of a crime; and (3) the communications on their face are not privileged. Points One and Two need no further repetition. As to point Three. a few brief observations are in order.

First as to paragraph 13 (all paragraph references at this point are to the Gallantz affidavit), on its face, Friend's advice to the advertising department that he wanted a preexisting promotional film changed is not necessarily legal advice; does not reveal confidential communications from, a member of the corporation control group; and is not necessarily made in confidence. All films of the corporation were already in possession of the Grand Jury and the indictment charges that these changes were directed in furtherance of the scheme to defraud.

Second as to paragraphs 15 and 18, the document in question was turned over to the Grand Jury and is marked Grand Jury exhibit 419 D. It is merely a summary of the procedures by which AMREP handled consumer complaints and is not privileged, since it is a summary of business practices of AMREP. On April 24, 1974, 15 months earlier, Judge Pierce reached a similar conclusion in rejecting AMREP's attempts to keep privileged the actual reports on such complaints which the AMREP legal department prepared and distributed to corporate officers. Hynes Aff. ¶ 12. In doing so, Judge Pierce held that the legal department reports themselves were (1) factual not legal presentations of the complaint and action taken thereon; (2) not legal advice; (3) information coming from third parties; and (4) reports mostly to third parties.

Finally as to paragraph 16, when Mr. Friend learned that AMREP speakers at sales dinners used scripts to make this presentation is not privileged. The scripts were produced by the corporation pursuant to Grand Jury subpoena. Hynes Aff. ¶ 13.

Equally unpersuasive is the claim that any of these questions or topics somehow trenches on the "work product" doctrine protecting the confidentiality of information acquired by an attorney in contemplation of or during litigation. The doctrine had its origins in the Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947), and was recently the subject of additional discussion in United States v. Nobles, 422 U.S. 225 (1975).

As with the attorney-client privilege, AMREP has utterly failed to establish any facts which support its claim that Friend improperly supplied the Grand Jury with work-product material. Since they do not outline the privilege itself* but rest primarily on unsupported assertions of its violation little need be said beyond what we have argued to oppose the defendants' attorney-client arguments, except a brief comment on the limitations on work product is in order.

Hickman involved an attempt by the party opponent in a civil action to secure from opposing counsel all written statements by, and his personal recollections of interviews

* An entire brief could be submitted on the narrow limits of work-product, but this is unnecessary in light of defendants' own papers.

with, the survivors of a tugboat accident. The Court noted that the information sought was available to the applicant by interrogatories, by interrogation of the survivors, whose identities were "well known", and by examination of the testimony given by the survivors before a board of inquiry. The Court held that in these circumstances, invasion by a pretrial discovery device of the opposing attorney's private files to secure oral and written versions of the survivors' statements to him unduly impinged on the "degree of privacy" required for the proper preparation of his client's case, since there was only a "naked, general demand "for the written statements and "[p]etitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure he has overlooked nothing." Id. at 512-13.

Similarly, in Nobles the issue was whether defense counsel might be compelled to disclose a report made by his investigator of an interview with a government witness if the investigator were called by the defense to testify about the interview at trial. The majority of the Court held that the calling of the investigator by the defense would constitute a waiver of the work product claim. In a penetrating concurring opinion Mr. Justice White pointed out that the work product doctrine is uniformly viewed "solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege." 422 U.S. at 246. He also noted substantial exceptions to the work product doctrine even as a

bar to pretrial discovery when the material sought to be discovered is evidentiary in character or if access to witnesses is unequal. 422 U.S. 250-251.*

The fundamental defect in the analysis offered in support of the objections on the grounds of work product is that it assumes that an attorney may not be inquired of concerning anything he has done or heard so long as he did or heard it in the course of the preparation of the litigation in connection with which the inquiry is raised. The cases relied upon do not support this assertion. It is apparent from even the most superficial reading of Hickman and Nobles that the work product doctrine creates a limited right in an attorney to refuse to disclose to the party opponent by way of pretrial discovery his recollections and impressions -- whether written on paper or graven in his memory -- of evidentiary materials, whether or not admissible, obtained in the course of his preparation for litigation.

* To the same effect is In re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840 (8th Cir. 1973). There the United States Attorney subpoenaed to the Grand Jury the attorney for the corporate target of the Grand Jury investigation and sought his notes and testimony concerning the content of his interviews with employees of his client in connection with the Grand Jury proceedings. The Court found that the persons whom the attorney had interviewed were available to the Grand Jury, and that the only basis of the United States Attorney's inquiry was that "something different might have been said" by the witnesses to the attorney. Id. at 849 (emphasis in original). The Court held the information sought covered by the work product doctrine and the showing by the United States Attorney inadequate to overcome it. The Court was careful to add: "We limit our holding to the facts disclosed by the record in our present case. We do not suggest that the policies supporting the work product doctrine, and therefore its scope, may not vary somewhat depending upon the nature of the proceeding in question." Id. at 849.

The Government neither sought nor obtained information of that sort. Of course, there is no authority for the proposition that the attorney cannot relate his own mental impressions in order to defend his own conduct, especially where confidential information of the clients is not revealed in the process. Most important is that, even if the "work product" doctrine were otherwise applicable to the information sought by the Government's questions, it is settled that "... when the activities of counsel are inquired into because they are at issue in the action before the Court, there is cause for production of documents that deal with such activities, though they are 'word product'." 4 J. Moore, Federal Practice ¶26.64[4] at 26-447 (2d ed. 1975).

Moreover, if the work product doctrine were as broad as it appears to be contended, both Hickman and Nobles, particularly Mr. Justice White's concurring opinion, make clear that the privilege may be overcome by an adequate showing of the necessity for the information sought and the inadequacy of other sources of information. The Court in Hickman made clear that the protection accorded work product, and its underlying public interest in the thorough and careful preparation of cases for trial, was not absolute: "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511. In the Court's view, the deterrent effect on

effective trial preparation that necessarily would result from lawyers' awareness that their work product was not to be preserved inviolate, but would be discoverable where adequate justification could be shown, did not outweigh the benefits to the "orderly prosecution and defense of legal claims" (Id., at 510) that would result from permitting discovery under such circumstances.

Here, of course, Friend's own conduct became one of those items at the very core of the Grand Jury's investigation. He was a principal corporate officer participating in the scheme to defraud, who was an important witness who sought to explain his conduct to the Grand Jury. Nothing he said violated the work-product doctrine any more than it violated AMREP's attorney-client privilege. As a target of the investigation he was entitled to volunteer his own impressions.

In summary, on the basis of the showing and particularized claims made to this Court, defendants' applications for relief based upon alleged violations of the attorney-client privilege should be denied.

D. THE GRAND JURY DID NOT VIOLATE THE JOINT COUNCILS OR SIXTH AMENDMENT RIGHTS OF ANY DEFENDANTS

The defendants make broad assertions that the Grand Jury has somehow invaded the councils of defense which were initiated, or Sixth Amendment rights which attached, when this investigation commenced. Yet despite their professed horror and anguish, they cannot point to one example in the extensive record of Solomon Friend's testimony before the Grand Jury of such improprieties, and they certainly fail to meet their factual burden of actually establishing such a claim. For this reason alone, the contention should be rejected.

As the issue is presented for the Court's decision, only a brief comment upon the applicable authorities seems in order. The defendants alternatively suggest the Government planted Friend as an informant in the defense camp (Friend Memo. of Law at 10-11 note), or that Friend took it upon himself to breach joint councils of defense, or that the Government's questioning of Friend was an "egregious, direct, and deliberate" instrusion into councils of the defense (Carity-Friedman Memo. of Law at 21). Each of these claims is incorrect.

1. Joint Councils of Defense

Apparently confident that claims of intrusion are enough to carry the day, the defendants neither present any specific facts which establish the existence and precise

scope of joint council relationships* or any legal authority to define the scope and extent of such relationships and the extent to which they are protected. All of the arguments made heretofore by the Government with respect to attorney-client apply with equal vigor to the defendants' claims of breaches in their joint councils of defense and need not be repeated.

Of course, the joint council theory grants no broader protection than that supplied by the attorney-client privilege, in the sense that the objecting party must establish each element and must particularize the communication complained of. The fact that two codefendants communicate to each other does not itself establish the existence of a joint defense or that the communications were made to assist a joint defense. See United States v. Gartner, 518 F.2d 633, 636 (2d Cir. 1975); Smale v. United States, 3 F.2d 101 (7th Cir. 1924); Leonia Amusement Corp. v. Loew's, Inc., 13 F.R.D. 438 (S.D.N.Y. 1953). What is divulged by and to the clients during joint defenses cannot be deemed confidential inter sese; full disclosure would result at the insistence of any one of them subsequent controversies between or among those clients. See, e.g., Grand Trunk Western R.R. Co. v. H.W. Nelson Co., 116 F.2d 823, 835 (6th Cir. 1941); C. McCormick, Evidence § 91 at 189-90; 8 Wigmore, supra, § 2312 at 605-06.

* The Government finds it difficult to understand the Fleming Affidavit's suggestion that Friend's supposed inability to state when and how he had obtained certain information proves a breach of a confidential relationship.

In this case, we do not know what communications are at issue, who made them, for what purpose, to whom, who was present, to whom they were transmitted, or what the sources of facts for the communications were.

The only facts that are established and uncontradicted are that (1) Friend was repeatedly warned that the Grand Jury did not want him to breach the attorney-client privilege or councils or defense of anyone (Hynes' Affidavit ¶ 10); (2) Friend is an experienced lawyer intimately familiar with the legal and other affairs of his corporate clients and more knowledgeable than anyone else as to what communications argueably were protected by attorney-client privilege; (3) when Friend testified he was represented by counsel whom he could consult as to any questions concerning privilege; (4) all of the defendants or counsel for them knew that Friend would testify on January 28, 1975, before the Grand Jury investigating AMREP, and knew that he was testifying on ten subsequent occasions, and yet apparently continued to actively consult him and convey information to each other and (5) the defendants or their agents were debriefing as many Grand Jury witnesses as possible, and certainly it is a safe inference that Friend was also debriefed, thereby advising the defendants what he was testifying to.

It must also be remembered that Friend's testimony was an attempt to exculpate himself and AMREP. It seems fair to assume that other corporate officers were quite content to permit Friend to make out their corporate and, therefore derivatively, their personal defenses without ever having to run the risk of personally testifying. If ever defendants had the best of both worlds this was it: they pleaded the Fifth Amendment and put as much of a defense as possible before the Grand Jury through AMREP's general counsel, Friend.

In light of these facts, the Government's conduct was clearly proper. There is no authority for the relief requested by the defendants. The defendants themselves took the chance that Friend, or any other corporate officer or codefendant, would not keep their secrets, and they created the confusion as to when Friend learned various facts by continuing to work closely with him. Their concern about pre-January, 1975, conversations is a sham in light of the continued collaboration with Friend after he was first called to testify before the Grand Jury. The defendants' position is tantamount to saying that a Grand Jury may never call as a witness the attorney of one of the potential targets, even where as the investigation progresses the evidence suggests that the attorney was personally involved in the wrongdoing of his client. The logical result of such

a principle is that where attorneys are involved in wrongdoing or have evidence bearing thereon, potential defendants will be well advised to use the attorney to defend against the investigation, since they will be immunized from revelations by the attorney. It is hard to conceive of a greater abuse of the attorney-client privilege.

2. Sixth Amendment

Defendants have not only grossly misstated the facts but their authorities are inapposite to the case at bar. The contention that the Grand Jury violated any person's Sixth Amendment right to counsel is disposed of by the fact no Sixth Amendment right to counsel attaches in a Grand Jury proceeding. The Sixth Amendment right to counsel attaches only upon the initiation of adversary judicial proceedings. Kirby v. Illinois, 406 U.S. 682 (1972). A grand jury inquiry is not an adversary proceeding. United States v. Calandra, 414 U.S. 338, 343 (1974). "A witness before a Grand Jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies." In re Groban, 352 U.S. 330, 333 (1957). See United States v. Duvall, __F.2d__, Dkt. No. 75-1225 (2d Cir. Feb. 26, 1976) slip. op. at 2130-34; United States v. Corallo, 413 F.2d 1306, 1330 (2d Cir.), cert. denied, 396 U.S. 958 (1969). See pp. 172-83 infra.

The inquiry of Friend, a corporate officer, into the affairs of AMREP, in no way infringed upon the other defendants' or Friend's constitutional rights. In re Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966), on which substantial reliance is placed, is of no application here. That case is entirely distinguishable "since there the attorney was sought to be examined after indictment of his client, and his investigation and preparation were the objects of the inquiry." United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971). cert. denied, 406 U.S. 917 (1972).

Terkeltoub is apparently one of the basis of the erroneous assertion that Sixth Amendment rights attach in a grand jury proceeding. This reliance is wrong. The Sixth Amendment rights Judge Frankel was talking about in Terkeltoub derived from the pending criminal indictment against Fiorillo, Terkeltoub's client, and the grand jury inquiry about Terkeltoub's activities in preparing for the trial of that indictment was thought by Judge Frankel to implicate Fiorillo's right to counsel at trial. Nothing of the sort is involved here.

We note moreover, that even in Terkeltoub, Judge Frankel said that, given a proper showing by the Government, an inquiry far more impinging on the defense of the case than the inquiry of Friend here might properly be made. By distinguishing Terkeltoub, we do not mean to be understood to agree with all that is said there. We think Terkeltoub, if correctly decided, must be limited in its application to

the precise circumstances there presented, as Judge Frankel made clear it was. The Second Circuit in United States v. Colasurdo, supra, appears to so limit it. Reliance on United States v. Mitchell, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973) is equally misplaced since 1) it ignores the limitation placed on Terkeltoub by Colasurdo and the limitation placed on the Sixth Amendment's reach by the cases cited supra at 95; and 2) Mitchell concludes that dismissal of the indictment even on a much more definitive showing than here was inappropriate. The relief demanded and the line of cases advanced by the defendants are similarly inapposite since they each involve post-indictment or post-arrest Sixth Amendment intrusions.*

* United States v. Gartner, supra, 518 F.2d 633; United States v. Rosner, supra; United States v. Rispo, 460 F.2d 965 (3rd Cir. 1972); Caldwell v. United States, 205 F.2d 879, cert. denied, 349 U.S. 930 (1955); Coplon v. United States, 191 F.2d 749 (1951), cert. denied, 342 U.S. 926 (1952).

E. FRIEND'S COMMUNICATIONS TO AND FROM HIS CLIENT, AMREP, WERE MADE DURING AND IN FURTHERANCE OF A CRIME AND THEREFORE ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

The Government contends that for all of the reasons set forth above, the Court should deny all attorney-client motions. However, we also submit that even assuming Friend conveyed otherwise privileged information to the Grand Jury, that this information was no longer privileged because it occured during and in furtherance of a crime; and therefore its receipt by the Grand Jury was proper. Our arguments on this point are set forth in detail in our opposition to the motions for severance, see p. 118 infra, and need not be repeated here.

However, one additional point is appropriate here. Although most of the cases discussing the criminal act exception do so in the context of testimony and evidence at trial, the exception applies with equal force to pretrial proceedings, including Grand Jury investigations.* In Union Camp. Corp. v. Lewis, 385 F.2d 143 (4th Cir. 1967), a corporation sought to quash a grand jury subpoena duces tecum on the grounds that the documents sought constituted

* See United States v. Nixon, supra; Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), where constitutionally privileged communications lost their protection pre-indictment and pretrial where the evidence was peculiarly necessary to carry out the Grand Jury's function and the prosecutive function at trial.

confidential and privileged attorney-client communications. The Fourth Circuit affirmed the denial of the motion to quash because the Government had met its burden with a "prima facie showing that the lawyer's advice was designed to serve his client in commission of a fraud or crime." Id. at 144, citing United States v. Bob, 106 F.2d 37 (2d Cir.), cert. denied, 308 U.S. 589 (1939). The burden was met by presenting the Court the documents in question and other evidence available to the grand jury. The Court concluded that the Government "was not at this stage of the proceedings required to prove the crime or fraud in order to secure the evidence." Id. at 145.

Courts have also permitted disclosure of such communications under this exception to the privilege in pretrial discovery proceedings in civil cases. Garner v. Wofinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971), decision on remand, 56 F.R.D. 499 (S.D. Ala. 1972); In re King Resources Co. Securities Litigation, supra. Accordingly, any breach of Friend's communications with his client were properly received by the Grand Jury, which could permissibly have compelled their disclosure.*

* Although it could have done so, the Government chose not to present such evidence to any of the Judges sitting in Part I, and never sought to compel disclosure at that time under the commission of a crime exception. Therefore, none of the Part I decisions were based upon such proof or the principle of law now advanced by the Government.

F. THE INDICTMENT SHOULD NOT BE DISMISSED

As set forth in detail above, the defendants are not entitled to the relief they desire because 1) all appropriate attorney-client warnings were given; 2) defendants have failed to meet any of the factual burdens imposed upon them; 3) there were no intrusions into either attorney-client or joint councils of defense confidences; 4) any intrusions were unintended not constitutional and not prejudicial; 5) any intrusions were permissible under the commission of the crime exception; 6) the defendants consented to the receipt of the allegedly privileged evidence; and 7) the individual defendants have no standing to raise this issue. For all of these reasons dismissal of this indictment would be totally unjustified and contrary to law. Moreover, such relief would be unjustified even if attorney-client and Sixth Amendment rights were abridged here.

The controlling principle for any motion to dismiss an indictment on the grounds that the grand jury received incompetent or illegal evidence is the Supreme Court's holding in Lawn v. United States, 355 U.S. 339, 349 (1958), that

> one indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.

The Lawn Court, relying principally on Costello v. United States, 350 U.S. 359 (1950), rejected defense attempts to inspect grand jury minutes and dismiss the indictment on the grounds that it was based upon an earlier grand jury's examination of the defendant in violation of his Fifth Amendment rights.*

The Court has recently cited Lawn to reject the very proposition advanced here by defendants: "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted . . . on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." United States v. Calandra, 414 U.S. 338, 345 (1974). Defendants' reliance on Calandra is grossly misplaced and their attempts to distinguish it unconvincing. Calandra does not recognize a distinction between incompetent or illegal evidence obtained outside of the grand jury and such evidence created by the grand jury itself. In the very passage quoted by defendants Carity and Hoffman (Memo. of Law at 17), the Court acknowledged that although a grand jury cannot compel a witness to violate a privilege, a defendant has no right to attack an indictment

* In doing so, the Lawn court rejected the District Court's approach in a related case relied on by defendants. United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y. 1953), appeal dis'd as untimely sub nom. United States v. Roth, 208 F.2d 467 (2d Cir.).

on the grounds that such a violation occurred: "an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid." Id. at 346. Moreover, the holding of Calandra was that the exclusionary rule did not prevent the grand jury from receiving illegally seized evidence. Defendants are not entitled to that which the Supreme Court has explicitly denied them:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the Grand Jury. This is not required by the Fifth Amendment. Costello v. United States, supra, 350 U.S. at 363.

In United States v. Tane, 329 F.2d 848 (2d Cir. 1964), relied on by defendants, the Court held that there was no right to dismiss an indictment based in part on inadequate or incompetent evidence. "As long as there is some competent evidence to sustain the charge issued by the Grand Jury, and indictment should not be dismissed." The Tane indictment rested exlusively on the testimony

of a witness derived from illegal conduct, and therefore was dismissed. Here, even defendants in their most extreme claims do not suggest the indictment rests exclusively or primarily on the trivial items they point to as privileged.

Defendants have not been able to cite one case where an indicment was dismissed for violation of the attorney-client privilege. In fact, the Second Circuit has explicitly and directly rejected the sort of application made by these defendants. United States v. Colasurdo, supra. There the government interviewed various attorneys, and three of the defendants' attorneys testified before the grand jury. The defendants sought dismissal of the indictment for a failure of the trial court to hold a preliminary hearing on whether the grand jury had before it evidence obtained in violation of the attorney-client privilege. The Court stated:

> Even if correct, appellants' assertions would not be grounds for dismissing the indictment. United States v. Blue, 384 U.S. 251 , 255 (1966); Lawn v. United States, 355 U.S. 339, 348-50 (1958); Costello v. United States, 350 U.S. 359, 363 (1956) (indictment based on hearsay). Otherwise, before trial on the merits there would always be a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay. 453 F.2d at 596.*

* As noted supra, Colasurdo also limits Terkeltaub explicitly to have no application to the facts of this case. 453 F.2d at 956.

It is not surprising that Judge Weinstein reached and identical result in United States v. Mackey, supra, so heavily and improperly relied upon by the defendants. While the defendants cite liberally from dicta and theoretical analysis in Mackey, they omit Judge Weinstein's conclusions and holdings which rejected the position they now advance. For example, he too concluded that in light of Costello, Lawn and Calandra,

> [i]t would seem to follow, a fortiori, that the right to invoke a common law testimonial privilege, which does not stand on a constitutional footing, does not imply any right to a dismissal of an indictment. Slip op. at 18.
>
> Fairly read, Costello may be said to stand for the proposition that the validity of an indictment under the Fifth Amendment is no way dependant on the legality of the evidence received by the grand jury. Id. at 21.
>
> . . .the [Supreme] Court perceives no limitations inherent in the Fifth Amendment on the kind of evidence that may be considered by a grand jury. Id. at 22.

The only other theoretical grounds for dimissal would be an an exercise of the court's supervisory powers over prosecutorial misconduct. See United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972). However, the Supreme Court in Costello "specifically held that this power should not be exercised so as to permit defendants to challenge

indictments on the ground that they are not supported by competent evidence." United States v. Mackey, supra, slip. op. at 24.

Moreover as set forth below, it is well settled that in the context of violations of constitutional rights, dismissal is not warranted without a showing of pernicious conduct by the prosecutor which has corrupted the process or of substantial prejudice. Where a common law testimonial privilege is at stake, the showing should be at least as substantial. In this case there has been no showing of any improper conduct by the Government, let alone conduct justifying dismissal.

Friend testified as an experienced attorney with the assistance of his own personal attorney, and with the full knowledge of his client, who it appears debriefed him following his testmony. Friend was repeatedly instructed by the prosecutor that the grand jury did not want any information which was the valid subject of attorney-client confidentiality. Certainly, there is nothing else either required of the prosecutor, or that could have been done, short of preventing Friend from testifying at all.

The fallacy of the defendants' argument in citing cases such as Coplon v. United States, supra, and Caldwell v. United States, supra, is readily apparent. In all these cases Government "intrusion" was found as a result of improper electronic surveillance, or the use of an informant or a sham defendant.* Here, the Government in no way engaged in the "pervasive and pernicious" intrusions which highlight the cases referred to by defendants. United States v. Mosca, 475 F. 2d 1052, 1060 (2d Cir.), cert. denied, 412 U.S. 948 (1973). The defendants pay almost no attention to the question of whether or not prejudice need be shown or not shown in intrusion cases. Moreover, their argument, discussed infra, conveniently assumes the very type of Governmental misconduct which is lacking here. Simply stated, there was no governmental intrusion in the present case and, accordingly, defendants' Sixth Amendment and joint council claims are totally without merit.

Defendants rely on United States v. Estepa, supra, and United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), but

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* The major electronic surveillance case which expressly deal with the improper conduct of the Government in intruding into the defense camp are: O'Brien v. United States, 386 U.S. 345 (1967) (per curiam); United States v. Black, 385 U.S. 26 (1966) (per curiam) and Coplon v. United States, supra; compare United States v. Alderman, 394 U.S. 165 (1969); United States v. Taglianetti, 398 F.2d 558 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969). The leading intrusion case based on governmental spying into the counsils of the defense through use of an informant is Caldwell v. United States, supra. Intrusion through use of a sham defendant is found in United States v. Rispo, supra.

these cases are not to the contrary. The Estepa Court dismissed an indictment for prosecutorial misconduct in the use of hearsay evidence in the grand jury where 1) the prosecutor violated a clear warning by the Court in United States v. Umans, 368 F. 2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940, cert. dismissed as improvidently granted, 389 U.S. 80 (1967), that certain procedures were required if hearsay evidence were used and the United States Attorney had given formal assurance that the procedures would be followed; and 2) the prosecutor nevertheless used hearsay evidence almost exclusively, without justification and without informing the grand jury. In Basurto, the prosecutor informed the Court and defense counsel that a major grand jury witness gave material testimony that was perjured. The Court concluded that although an indictment valid on its face would not permit an "independent inquiry . . . to determine the kind of evidence considered by the grand jury in making its decision," id. at 785 (emphasis added), this particular disclosure by the prosecutor would not permit a defendant to stand trial when the prosecutor knows "that perjury permeates the indictment." Id. No such circumstances can be found here and therefore neither a preliminary hearing on the grand jury's evidence nor a dismissal of the indictment

is permissible.*

The defendants assert that governmental intrusion into councils of defense (intrusions they have not shown) requires automatic dismissal without the necessity of showing actual prejudice. (Carity-Friedman Memo. of Law at 21). In those situations where Governmental intrusion into some aspect of the defense case has occurred, but such intrusion has not been deemed to be particularly onerous or pernicious, courts will consider whether the government's conduct has resulted in any prejudice to the defendant. United States v. Mosca, supra, at 1061; United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970); see also North Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973); Manuel v. Salisbury, 446 F.2d 453 (6th Cir. 1971), cert.

* United States v. Mitchell, supra, and United States v. De Marco, 401 F. Supp. 503 (C.D. Cal. 1975) appeal pending, are equally unpersuasive. To the extent Mitchell was correctly decided (having ignored the explicitly contrary precedent of Colasurdo), it did not result in dismissal despite the prosecutor's knowing receipt of work product material volunteered by an attorney. The Court in DeMarco acknowledged that it was unable to find a single case in support of its conclusion. DeMarco is simply wrongly decided when it requires a prosecutor seeking a superceding indictment to inform a second grand jury that another grand jury previously indicted the defendant, so the grand jury may consider the prosecutor's motive and strategy in making venue decisions and asking for another indictment.

denied, 405 U.S. 1046 (1972).* To support the argument for the application of a per se rule, defendants point to those cases where governmental intrusion was particul- offensive and was effected by means of illegal electronic surveillance, government spies, or sham defendants. But, as already indicated, those cases bear no resemblance to the facts here. The Second Circuit "has never adopted" the per se rule", United States v. Gartner, supra, 518 F.2d at 637, and has explicitly held that the per se rule would have no application unless the government has been guilty of pernicious and corrupting misbehavior, United States v. Rosner, supra, 485 F.2d at 1227 (distinguishing cases relied on by defendants). To call the Government's conduct here pernicious is to do violence to the English language. A dismissal on such grounds is totally unjustified.

Assuming arguendo this Court accepts the contention that there were intrusions here, defendants have not shown any prejudice, much less that which would justify the relief sought. See e.g., United States v. Hoffa, supra; United States v.

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* United States v. Hoffa, 385 U.S. 293, 306-07 (1966), also supports the Government's position that invocation of a per se rule requires a finding of "government intrusion of the grossest kind upon the confidential relationship between defendant and his counsel" (emphasis supplied).

In other Sixth Amendment contexts, a showing of prejudice is clearly necessary. See, e.g., United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973) (joint representation); Barker v. Wingo, 407 U.S. 514 (1972) (speedy trial). In other situations, Sixth Amendment violations require application of an exclusionary rule, not reversal, e.g., United States v. Barone, 467 F.2d 247, 249 (2d Cir. 1972) (post-indictment inculpatory statements in the absence of counsel).

Rosner, supra; and United States v. Mosca, supra. The Second Circuits' resolution of the defendants' claim in Rosner is directly applicable to these defendants and worth quoting at some length.

> The question is whether the prosecutor had any right to tell a prospective defendant not to engage in conferences with the attorneys for a co-defendant.... Each could contribute what he thought useful to the common defense, and glean what he might for his own defense. Neither had agreed to serve as a human recording device for the prosecution.
>
> If the co-defendants were not intruding agents of the Government there was no constitutional restraint on their ultimately divulging what they had learned. There is, indeed, proof in this record that they actually did not divulge anything. An attorney and his client who meet freely with potential co-defendants in a criminal case always expose themselves to the risk of a subsequent disloyalty by the co-defendant whom they might have been better advised to examine through his own attorney, without the risk of unwitting disclosure. The attempted disclosure of the content of a joint conference of co-defendants with the lawyer of one of them may possibly give rise to a claim of privilege, see Proposed Rules of Evidence for the United States Court, Rule 503(b)(3), but the breach of a common law privilege, as such, is not necessarily of constitutional dimension. The constitutional barrier is raised when it is the Government that unlawfully intrudes on legal strategy conferences, as when it eavesdrops by electronic means, Black v. United States, supra, or when it "plants" a spy in the legal conference, Caldwell v. United States

supra. Id. at 1226-27 (emphasis supplied; footnotes ommitted).*

Friend most certainly was not a sham defendant or a government planted informer in the councils of the defendants or even a cooperating witness. As noted above, the defendants have not shown one case where such a dismissal has been granted on grounds they advance. On the contrary, applicable precedents, especially in this Circuit, have rejected such an approach. As Judge Weinstein concluded in United States v. Mackey, supra, slip op. at 34-36, there is no basis here for exercising the court's supervisory powers to dismiss the indictment. Cf. Costello v. United States, supra.

Finally, the Government submits that the defendants have no right to suppress any privileged statements or documents and most certainly not at this stage of the proceeding. Those privileged statements, if any, that were disclosed to the Government, were not disclosed as a result of any illegal or improper conduct by the Government. At most, disclosure was a result of the mistaken judgment of AMREP's general counsel, who knew best what was privileged. The Government was in no position to second guess his judgment or to assume Friend was lying. Therefore, reliance thereon was proper. The exclusionary rule is only designed to inhibit illegal government conduct, and has no application and no deterrent value in a situation such as this.

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* See also United States v. Gartner, supra; United States v. Andreadis, 234 F. Supp. 341, 345 (E.D.N.Y. 1964).

Moreover, the privilege is a testimonial one. All of the questions necessarily involved in a resolution of the privilege issues will be fully developed at trial, especially the commission of the crime exception, and therefore it would be an unnecessary and more difficult use of the Court's time to resolve the suppression question now without the benefit of that development. It is especially unnecessary in light of the trivial nature of the communications complained of. It may turn out that nothing now complained of will be offered in evidence, or that it is fully admissible. United States v. McCarthy, 292 F.Supp. 937, 946 (S.D.N.Y. 1968).

In summary, the Government acted in complete good faith here. Friend was given all proper warnings; no court warnings or government promises were violated; and there was no intent or attempt to prejudice the Grand Jury with inflammatory, irrelevant material. The witness was an experienced attorney and knowledgeable as to any valid privleges held by his client AMREP. Defendants' claim of privlege is tenuous and unsubstantiated. The intrusion, if any, was slight and without prejudice; neither intentional or flagrant; and a possibility known to all defendants as they continued to deal with Friend. Finally, the Grand Jury did not rely exclusively on the few allegedly "privleged" communications, which in any event will be admissible at the trial. In this case, a dismissal is completely unjustified, and its purpose and effect are overwhelmingly outweighed by the considerations articulated in Costello and Calandra.

VII. DEFENDANTS FRIEND AND AMREP ARE PROPERLY JOINED AND SHOULD BE TRIED IN ONE TRIAL WITH ALL OTHER DEFENDANTS.

INTRODUCTION

AMREP moves to severe Friend on the ground that he would present a defense at trial antagonistic to that of the corporation, and that this would create unfair prejudice. In reaching this factual conclusion, AMREP relies upon Friend's Grand Jury testimony which by the strongest implication counsel for AMREP suggests represented a perjurious attempt to exculpate himself at the expense of inculpating his co-defendants. The true state of affairs concerning the present relationship between these defendants can best be gleaned from noting the fact that the receipt of Friend's Grand Jury testimony by the corporate defendants has in no way altered his employment status as the highly paid Vice- President and General Counsel of AMREP. Indeed, the corporation makes the further amazing argument in favor of severance that Friend continues to be a vital member of the legal defense team and that his presence is needed by them as their counsel in the defense of this case. The contention that potentially antagonistic defenses of the kind involved here justify a severance is a proposition long rejected by the decisions in this Circuit, as will be shown more fully below.

The contention that a severance should be granted so that Friend can act as AMREP's attorney at trial must be, particularly under the circumstances of this case, one of the most preposterous arguments ever advanced in support of a severance motion.

The defendants AMREP and Friend also move for severance on the ground that Friend would be required to breach AMREP's attorney-client privilege and/or alleged related privileges. We will show that this is by no means a novel issue in mail fraud prosecutions in which clients and lawyers are both indicted, and the case law and prior experience make it completely clear that no need for a severance exists. This is mainly true, of course, because the Government will speedily prove the required prima facie case of fraud against the corporation, and any attorney-client privilege will then be lifted, since the privilege does not apply to communications in furtherance of torts, frauds, and crimes. None of the defendants will, of course, be required to put on a defense until the Government has met a higher burden of proof at the close of its direct case then is required in order to lift the privilege. It is of further interest that the other defendants have already indicated their defense will involve, to a significant degree, an alleged reliance upon advice of counsel. Hence, it is clear that

they will not desire to maintain the confidentiality of attorney-client communications themselves.

Friend further requests a severance because of claims that most of the evidence presented at a joint trial will have no relevance to him. As will be shown, this is entirely incorrect. A separate trial of Friend would involve almost all of the same evidence as will be presented at a joint trial.

Finally, Friend asks for a severance on the ground that he desires to call his co-defendants to testify on his behalf at a separate trial. Aside from the very clearest indications in AMREP's motion papers that the co-defendants would materially contradict Friend's own testimony before the Grand Jury, this argument for a severance will be shown to be as completely without merit as it has been found to be in the innumerable prior cases in which it has been rejected out-of-hand.

A. GENERAL PRINCIPLES OF SEVERANCE

As a general matter, the interests of convenience, economy and efficient administration of justice dictate that persons joined in the same indictment should be tried together, particularly where the proof will be extensive and numerous witness will be summoned. United States v. Lebron, 222 F.2d 531, 535 (2d Cir.), cert. denied

350 U.S. 876 (1955); United States v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967); United States v. Kahaner, 203 F. Supp. 78 (S.D.N.Y. 1962), aff'd, 317 F.2d 459 (2d Cir. 1963), cert. denied, 375 U.S. 836. While the decision as to whether or not to grant a severance is left to the discretion of the trial court, Opper v. United States, 348 U.S. 84 (1954); United States v. Aviles, 274 F.2d 179, 194 (2d Cir.) cert. denied, 362 U.S. 974 (1960), the burden is upon the defendant to show that he would be so prejudiced by being tried with another defendant that he will in effect be denied a constitutionally fair trial. United States v. King, 49 F.R.D. 51, 53 (S.D.N.Y. 1970); United States v. Fassoulis, 49 F.R.D. 43, 44-45 (S.D.N.Y. 1969), aff'd, 445 F.2d 13 (2d Cir. 1971), cert denied, 404 U.S. 858; United States v. Kaufman, 291 F. Supp. 451, 452 (S.D.N.Y. 1968); United States v. Wolfson, 289 F. Supp. 903, 908 (S.D.N.Y.), aff'd, 405 F.2d 779 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

In order to establish that he is entitled to a severance, a defendant must show that the prejudice resulting from joinder is "real", United States v. Kahn, 381 F.2d 824, 840 (7th Cir.), cert. denied, 389 U.S. 1015 (1967), and that it is so compelling that the trial court will be unable to afford protection. United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974); see Tillman v. United States, 406 F.2d 930, 935 (5th Cir.),

M-1604-5 cert. denied, 395 U.S. 950 (1969); United States v. Lev, 22 F.R.D. 490, 492 (S.D.N.Y. 1958), aff'd, 276 F.2d 605 (2d Cir. 1960), cert. denied, 363 U.S. 812. In a case such as this, the showing of prejudice must be particularly cogent ". . . to justify the disintegration of a trial . . . in which there is cohesion of crime alleged, defendants charged and proof adduced." United States v. Kahn, supra, 381 F.2d at 840; United States, v. Kaufman, supra. In exercising its discretion, the trial court must, of course, take into consideration the time, burden and expense which separate trials would entail. United States v. Verra, 203 F. Supp. 87 (S.D.N.Y. 1962); United States v. Wallace, 272 F. Supp. 838 (S.D.N.Y. 1967).

In order to obtain a severance and prevent a joint trial a defendant must demonstrate more than "a better chance of acquittal at a separate one . . . " United States v. Koss, 73 Cr. 903 (S.D.N.Y.), aff'd,506 F.2d 1103 (2d Cir. 1974), D. Ct. Slip op. at 2, citing United States v. Fantuzzi, 463 F.2d 683, 687 (2d Cir. 1972). See United States v. Calabro, 467 F.2d 973 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973). A severance should not be granted merely because a defendant claims he will be prejudiced by being associated with a codefendant at trial. United States v. Myers, 406 F.2d 746, 747 (4th Cir. 1969);

United States v. Crisona, supra, 271 F. Supp. at 155. The true standard for determining whether a defendant is entitled to a severance was articulated by Judge Weinfeld in United States v. Kahaner, supra, 203 F. Supp. at 81-82:

> The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.

B. CONFIDENTIAL COMMUNICATIONS

Alleged violations of attorney-client or other privileges through Friend's anticipated defense are no basis for a severance of Friend. It is universally acknowledged and beyond peradventure of any doubt that the attorney-client privilege does not protect a communication made in furtherance of a crime.* Clark v. United States

* Of course, the work-product privilege is significantly more limited than the attorney-client privilege. pp. 86-90 supra. Since it can be overridden by a showing of "good cause" it follows that work product created in furtherance of a crime is not privileged.

289 U.S. 1 (1933); United States v. Bob, supra; accord, United States v. Weinberg, 226 F.2d 161 (3rd Cir. 1955); Union Camp Corp. v. Lewis, supra; Garner v. Wolfinbarger, supra; United States v. Hoffa, 349 F. 2d 20 (6th Cir. 1965); United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973); cert. denied, 415 U.S. 921 (1974); United States v. Bartlett, supra; United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972); Wigmore, supra § 2298; McCormick, supra, § 99.

In one of the classic recitals of the prevailing principle, the Supreme Court stated that "a client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Clark v. United States, supra, 289 U.S. at 15. Communications otherwise sacrosanct lose all protection as soon as it is shown by "prima facie evidence that . . . [charge of a crime] has some foundation in fact." Id.; United States v. Bob, supra; United Statesv. Castellana, 349 F.2d 264 (2d Cir. 1966). Moreover, it is not necessary that the attorney knowingly take any part in the criminal activity. On the contrary, he may be totally innocent as long as the communications were used by the client for a criminal purpose.

If the

> communications are made in furtherance of acts contemplated by the client, the attorney need not have joined together with the client to commit the fraudulent or criminal acts and the attorney may be ignorant of them. United States v. Aldridge, supra, 484 F.2d at 658

See Clark v. United States, supra.

As will be seen below, this exception to the attorney-client privilege permits discovery and disclosure of such communications at the demand of the Grand Jury and at the trial of criminal matters. Therefore, assuming arguendo this Court concludes that Friend breached the attorney-client privilege when testifying before the Grand Jury, such breaches were not improper because they fall within the criminal act exception. See p. 98 supra. Moreover, at the trial of this case all attorney-client communications between Friend and his client, including those previously withheld from the Grand Jury by rulings of judges sitting in Part I, will be discoverable by the Government and admissible in evidence against the defendants. Accordingly, Friend will not have to break any still-privileged confidences.

Frequently it develops that at trial the Government or a co-defendant offers evidence of attorney-client communications against a defendant. Such evidence is

admissible if independent evidence establishes a prima facie case that the communications were made in furtherance of a crime or fraud. For example, in the leading and often cited Second Circuit case of United States v. Bob, supra, the former attorney for the corporate president and corporation, who were both defendants, was permitted to testify to privileged communications, because the Government first established with prior testimony a prima facie case of a scheme to commit mail fraud. Accord, United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973); United States v. Kahn, 366 F.2d 259 (2d Cir. 1966), cert. denied, 385 U.S. 948; United States v. Castellana, 349 F.2d 264, 277 (2d Cir. 1966) (transaction shown at trial to be in furtherance of scheme to defraud so privilege does not apply).

To the same effect are numerous cases in other Circuits. For example, in United States v. Aldridge, supra, a securities and mail fraud case, the defendants claimed that the testimony of a co-defendant, the defendants' corporate attorney, violated their attorney-client privilege. The claim was rejected because at the time of the co-defendant's testimony, the Government had established a prima facie case of fraud by the defendants. United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944, is an excellent example of the correct procedure.

1604-10 In that mail fraud case involving the sale of land, the Government first established fraud by showing falsehoods in the defendant company's mailings, and by circumstantial evidence, and then was permitted to have the corporate attorney testify and place blame for the fraud on the individual defendants. See also United States v. Bartlett, supra (corporate attorney testifies for Government about advice given and information received at a board of directors meeting); United States v. Friedman, supra; United States v. Billingsley, 440 F.2d 823 (7th Cir. 1971), cert. denied, 403 U.S. 909; and United States v. Weinberg supra.

The lesson of these cases is clear for the instant case. The Government contends that Friend's communications with his client, including those alleged to be privileged, were in furtherance of the crimes committed by Friend and his co-defendants. At trial, once the Government has shown by independent evidence a prima facie case that AMREP committed fraud in the sale of land, it is entitled to offer all relevant attorney-client communications. At that point, the Government would also be entitled to lift the privilege from and obtain all attorney-client documents theretofore subject to protective orders issued by various judges of the Court

M-1604-11 during the Grand Jury's investigative proceedings.*

It is also significant to note that the papers of the other defendants, especially those of Hoffman-Friedman, clearly indicate that the defense will involve, to a significant degree, an alleged reliance upon the advice of counsel. Hence it is clear that they will not desire to maintain any "confidentiality" of communications themselves.

The Court need not speculate on whether the Government will make out such a prima facie case of fraud by the defendants. In this case, where the corporations, the corporate officers and the corporate counsel are all defendants and alleged participants in the fraud, unless the Government meets this burden, any defendant against whom a prima facie case has not been shown will be out of the case and will not have to present any defense. The case will not go to the jury, and the Court will be bound to grant motions for judgments of acquittal. In that event, the instant motions are moot. However, if independent evidence

* In this connection, the Government will serve the defendant AMREP with a trial subpoena calling for the production of all documents previously subpoenaed by the Grand Jury which were held subject to the attorney-client privilege during various Part I proceedings of the Court. At the very latest, the Government would be entitled to such documents at the point during trial when a prima facie case of fraud by AMREP is first established.

establishes a prima facie case, not only does the case go the jury, but the jury is entitled to hear all relevant attorney-client communication.

AMREP's joint councils of defense claims, as yet unsubstantiated, must fall under the weight of this principle. AMREP, of course, knew that its practices and its principal corporate officers, including Friend, were under Grand Jury investigation. Yet AMREP and each of the defendants continued to collaberate with each other, pursuing to the extent possible a common defense. This collaboration continued even after Friend was put on notice in January, 1975, that his position was not different from that of any other principal corporate officer, and even after Friend directly, and the others through counsel, were told in July, 1975, that they were targets of the Grand Jury. In fact, to this very day, AMREP maintains that Friend is an indispensable ally in the preparation of this case.

This point is hard to comprehend and, to say the least, contradictory to the bulk of AMREP's motion papers, but, we submit, shows the absurdity of AMREP's current position on severance. AMREP and the other principal officers attack the indictment and a joint trial on the grounds that Friend has and will defend himself at all costs with exculpatory statements which inculpate his co-defendants.

Since they presumably do not concur with Friend's self-serving assertions, they impliedly accuse him of past and upcoming perjury. Accordingly, defendants claim continued reliance on an antagonistic co-defendant who will stop at nothing, including perjury, to absolve himself.

Of course, each defendant has known all along that any co-defendant, including but not limited to Friend, could seek to absolve himself from liability by turning against his colleagues. Disclosure by any co-defendant was a risk they all assumed when they trusted one another. P. 110 supra. Therefore, aside from the lack of any constitutional barrier as a result of this situation, p. 95 supra, they cannot be heard to call for a severance for such a self-created situation.

Accordingly, Friend's concerns are illusory. He will not be required to assume the onus of breaking a client's confidence in order to defend himself. That burden will be assumed by the Government in the presentation of its case in chief. By the time Friend offers a defense, his clients will no longer have any privilege.* Therefore,

* The Government repeats here its earlier position that the other individual defendants have never established that they have a personal attorney-client relationship with Friend. Therefore they cannot seek a severance from him on this ground.

neither Friend nor AMREP can complain, since Friend will give testimony which is no longer subject to confidentiality. To say that such testimony may harm other defendants is merely to say that the testimony of Friend, which will be proper for the jury to hear, is probative of the charges in this indictment and may shed light on the truth. It most certainly cannot be characterized as constitutionally prejudicing the defendants' rights to a fair trial. Defendants' position is tantamount to ruling that an attorney and his client cannot be tried together for a crime they committed together. Such a result denies rationality and should not be countenanced. Obviously, it would be premature and unnecessary to decide the defendants' attorney-client claims at this point without a full development of the factual context and the applicability of the commission of a crime exception, which can best be, and by necessity will be, developed at trial. See United States v. McCarthy, supra, 292 F. Supp. at 946.

C. CO-DEFENDANTS' ALLEGED EXCULPATORY TESTIMONY

Friend next contends severance is required because his co-defendants will corroborate his testimony and thereby exculpate him. On its face this argument strains credulity. Moreover, beyond the precatory expectations contained in his memorandum of law (p. 26), Friend offers not one scintilla of evidence to support his assertion.

The Second Circuit in United States v. Finkelstein, 526 F.2d 517, 523-24 (2d Cir. 1975), has recently observed that some, but not necessarily all, of the criteria for a trial court to consider on such an issue include:

> (1) the sufficiency of the showing that the codefendant would testify at a severed trial and waive his Fifth Amendment privilege, United States v. Kahn, 381 F. 2d 824, 841 (7th cir.), cert. denied, 389 U.S. 1015 (1967); Gorin v. United States, 313 F.2d 641, 646 (1st Cir.), cert. denied, 374 U.S. 829 (1963); cf. United States v. Sanchez, 459 F.2d 100, 102 (2d Cir.), cert. denied, 409 U.S. 864 (1972); (2) the degree to which the exculpatory testimony would be cumulative, Byrd v. Wainwright, 428 F.2d 1017, 1021 (5th Cir. 1970); (3) the counter arguments of judicial economy, United States v. Shuford, 454 F.2d 772, at 777 n.5, (4th Cir., 1971); and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment, Wainwright, supra.

In order to obtain a severance on this ground, these defendants "must demonstrate by a 'clear showing' that the co-defendants would testify in exculpation." United States v. Koss, supra, slip op. at 7, citing United States v. Kaufman, supra 291 F. Supp. at 452-53. United States v. Kahn, supra; United States v. Dioguardi, 332 F. Supp. 7, 13 (S.D.N.Y. 1971). Here as in Koss and Kaufman, the court is faced only with speculation that a defendant may seek testimony from a co-defendant who may or may not invoke his Fifth Amendment at a joint trial or a separate trial. United States v. Caci, 401 F.2d 664, 671-72 (2d Cir. 1968), cert. denied, 394 U.S. 917 (1969). The Court has no basis for knowing whether the co-defendants would testify at a separate trial, what they would say and whether it would be exculpatory of Friend. The unspecified testimony may only corroborate the testimony of the lawyers whom Friend intends to call to exculpate him. Finally, in light of his vehement claims that he and the other co-defendants may have antagonistic defenses, it is hard to take seriously Friend's hopeful assertion of help from his co-defendants. It appears that it would be subject to substantial impeachment on the basis of Friend's own testimony.

As a slight variation of this theme, Friend suggests that he may be required to comment on [illegible] defendant's failure to testify. His doing so would deny co-defendants their Fifth Amendment rights, and any prohibition against doing so would violate his own rights; or so the argument goes.

This contention has two flaws. In the first place, the Court has no basis for knowing at this time that the co-defendants will not take the stand in a joint trial. Once again Friend invites the Court to speculate. Secondly, Friend does not have an absolute right to make such commentary. Friend's reliance on United States v. De Luna, 308 F.2d 140 (5th Cir. 1962) is misplaced. There the conviction was reversed for a defendant's commentary on another's failure to testify and because a defendant called another defendant as a witness, who invoked his privilege against self-incrimination. Although DeLuna discussed the right to make such commentary, this Court has observed, however, that "DeLuna did not confer an absolute right on a defendant to comment on his co-defendant's failure to testify. The question is 'whether a defendant should be permitted to comment in order to assure him a fair trial.'" United States v. Koss, supra, slip op. at 8; United States v. Kaufman, supra, 291 F.Supp. at 453-54. Accord,

United States v. Kahn, supra, 381 F.2d at 841. DeLuna's dicta has also been devastatingly rejected by Judge Weinfeld in United States v. Marquez, 319 F.Supp. 1016, 1019-23 (S.D.N.Y. 1970), aff'd, 449 F.2d 89, 93 (2d Cir. 1971), cert. denied 405 U.S. 963 (1972)*. Since there is no right to comment at trial and therefore no right to severance during trial, ipso facto, severance before trial would be improper.

Friend has not been definitive about what his defense will be. It is impossible to say whether he will explicitly and directly inculpate his co-defendants, or assume a common line of defense denying wrongdoing by AMREP or any of its officers, or simply deny knowledge and intent on his own part, or some combination of these. There simply has not been the necessary showing of sufficient

* AMREP's reliance on De Luna (Memo of Law at 24-25) is a good example of the misrepresentations of authority contained throughout the legal papers in support of these motions. DeLuna did not, as AMREP claims, grant a severance. It only reversed for commentary on the failures to testify, and the dicta that severance was required has been roundly criticized and distinguished by this Court and most Courts considering the issue, including the Fifth Circuit which decided De Luna (see discussion above in accompanying text), a fact which defendants' papers conveniently fail to note.

prejudice to Friend if he is not permitted to comment on co-defendants' failure to testify.* United States v. Koss, supra; United States v. Marquez, supra, 319 F. Supp. at 1018; United States v. Caci, supra, 401 F.2d at 672.

The other cases relied upon by the defendants are equally inapposite. In United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966), the District Court exercised its discretion to grant a severance where there was no dispute that the co-defendant had made oral and written exculpatory statements and upon a finding that relief "should not entail heavy burdens of added time and expense." Id. at 285.** In United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), the co-defendant whose testimony was sought had given

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* Of course, if sufficient prejudice is shown at trial, the Court can grant a severance. For this reason alone, on no more than their speculations, the defendants cannot rely on United State v. Kelly, 349 F.2d 720 (2d Cir.), cert. denied, 384 U.S. 947 (1965), for a pretrial severance. United States v. Koss, supra, slip. op. at 3.

** This Court and others have so distinguished Gleason. United States v. Kaufman, supra; and United States v. Crisona, supra; see also Byrd v. Wainwright, supra.

testimony exculpatory of the movant at an earlier trial, and repeated his views in open court a number of times. In United States v. Shuford, supra, Shuford's co-defendant Jordan was his only witness to refute the Government's witness on a critical point; and Jordan had indicated quite clearly that he would testify if there were a severance, and what the content and importance of his testimony would be. That is a far cry from the case at bar. Byrd v. Wainwright, supra, involved a strong likelihood that some of the sought after co-defendants would plead guilty. Wainwright has been so distinguished by the Second Circuit in United States v. Finkelstein, supra.

The Courts have carefully limited the application of Echeles and DeLuna to their special factual situations, including the slight duplication of trial time involved in each case. United States v. Finkelstein, supra; Gouleski v. United States, 405 F.2d 253 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969); Smith v. United States, 385 F.2d 34, 38 (5th Cir. 1967); United States v. Kahn, supra, 381 F.2d at 840; and see United States v. Caci, supra, 401 F.2d at 762.

D. ANTAGONISTIC DEFENSES

Friend's papers do not explain how and to what extent his defense will conflict with that of any other defendant. He hedges his bets by not setting forth explicitly the antagonism alluded to or how the defenses might be mutually exclusive. His claims are even more difficult to understand in light of AMREP's protestations that Friend's presence at a joint trial would "deprive AMREP of the legal assistance, knowledge and expertise of its General Counsel" (Memo. of Law at 9). Apparently, a defendant with an "irreconcilable," antagonistic defense is an indispensable member of AMREP's legal defense team. (id. at 28-29), who is going to give his codefendants invaluable pretrial succor.

A severance should not be granted merely because defendants contend that conflicting and antagonistic defenses will be offered at trial, United States v. Perez, supra, 489 F.2d at 68; Allen v. United States, 202 F.2d 329, 334 (D.C. Cir.), cert. denied, 344 U.S. 869 (1952), or because there is hostility among defendants or a defendant desires to exculpate himself by inculpating another defendant. United States v. Perez, supra; United States v. Barber, 442 F.2d 517, 530 (3rd Cir. 1971) cert denied, 404 U.S. 846; Dauer v. United States, 189 F.2d 343, 344 (10th Cir.), cert. denied,

342 U.S. 898 (1951); United States v. Kahaner, supra, 203 F. Supp. at 81. The true standard must still be that articulated by Judge Weinfeld in Kahaner: namely, whether, under proper instructions by the Court, the jury can render a fair and impartial verdict as to each defendant.

Defendants' reliance on United States v. Valdes, 262 F.Supp. 474 (D.P.R. 1967), and Bruton v. United States, 391 U.S. 123 (1968) and the spector of antagonistic defenses for justification of separate trials is in error. We note in passing that in Valdes one defendant placed sole blame on the other and the resulting two consecutive trials were quite brief. Bruton only bars out-of-court statements of defendants that incriminate their co-defendants when the declarant does not testify. There is no violation of any constitutional rights when statements, made in or outside the courtroom, which incriminate a co-defendant are admitted in evidence as long as the declarant, in this case Friend, testifies and is available for full cross-examination. Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399, U.S. 149, 158 (1970); Bruton v. United States, supra.

This is consistent with a long line of cases in this Circuit and this District which fail to recognize antagonistic defenses as a basis for severance.

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> It is common in cases of joint indictments that there is hostility of some of the defendants to the others and that they will try to save themselves by placing the blame on their associates in crime. United States v. Cohen, 124 F.2d 164 (2d Cir. 1941).

As the Cohen court concluded in rejecting a severance, the jury will simply have to weigh such testimony and its motives when it evaluates the case. A defendant has a right to get up and "to incriminate all the other defendants and to exonerate himself." United States v. Bentvena, 319 F.2d 916, 944 (2d Cir.), cert. denied, 375 U.S. 940 (1963); see also United States v. Houlihan, 332 F.2d 8, 15 (2d Cir.) cert, denied, 379 U.S. 828 (1964) (co-defendants' testimony vertified critical portions of the Government's case); United States v. Kaufman, supra; United States v. Kahaner, supra, 203 F. Supp. at 81; United States v. Abrams, 29 F.R.D. 178 (S.D.N.Y. 1961).

There is an additional important factor that should be considered here. Separate trials for Friend and his co-defendants could lead to a fraud upon the Court and two different juries. Although Friend's co-defendants have not indicated even slightly what their defense will be, it is certainly common in such fraud cases for corporate officers to plead advice of counsel as a defense to the element of

intent. For example, here at their own trial the corporate officers might testify that Friend advised them their conduct was legal. However, the truth may be that the corporate officers never told Friend of certain facts before asking for his legal advice or that he never gave certain legal advice. Assuming Friend is tried second, his side of the story would be unavailable to the jury. Likewise, at Friend's own trial, whether convicted earlier or not, the co-defendants may still plead the Fifth Amendment, and prevent the second jury from the other side of Friend's version of the truth. In this way, two different juries may separately acquit the different defendants on inconsistent versions of critical facts because they do have the full story. In a nutshell, AMREP's position is that probative evidence should be kept from the jury no matter how much it bears on the truth, simply because it comes from a co-defendant. Certainly such a result is not only prejudicial to the Government, but is contrary to the public interest and not possibly required to provide the defendants a constitutionally fair trial.

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E. THE GOVERNMENT'S PROOF AT TRIAL WILL BE SIMILAR AND ADMISSIBLE AGAINST ALL DEFENDANTS

Friend claims that under United States v. Kelly, supra, he is entitled to a severance because the bulk of Government's evidence will be "relevant only to co-defendants" and "Friend could not be held liable for any alleged acts completed prior to his employment by AMREP." (Memo of Law at 32). While the Government agrees that Friend cannot be found guilty for mere associations with his co-defendants, it submits that Friend's contentions are frivolous and based upon fundamental misunderstandings or misapplications of the governing body of law.

The Government will prove at a joint trial the fraudulent conduct of AMREP and the corporate officer defendants, including Mr. Friend, beginning with the acquisition of New Mexico land in 1961. It will show the conduct and knowledge of the defendants by direct testimony and circumstantial evidence. Although Friend first did work for AMREP in 1969, once the Government proves by a preponderance of independent evidence Friend's role in the scheme, he is responsible for all past and future acts of his coschemers which are in furtherance of the scheme. Pinkerton v. United States, 328 U.S. 640 (1946) United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975);

United States v. Cohen, 145 F.2d 82 (2d Cir. 1944)* Friend is liable for acts committed without his knowledge and for the conduct of co-schemers whose very existence is unknown to him. See, e.g., United States v. Bynum, 485 F.2d 490, 496 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974).

To convict Friend, the Government must show that there was scheme to defraud, and that Friend knowingly and wilfully joined the scheme. Therefore, in any trial of Friend, joint or separate, the Government will be entitled to show the existence, purpose and scope of the scheme to defraud before Friend became involved. Second, a substantial portion of this proof, if not all, together with the proof of AMREP's activities after Friend's entry, will establish directly or circumstantially Friend's knowledge of the scheme, its ommissions and its misrepresentations. Finally, part of Friend's role was to provide advice to other co-schemers about how AMREP could comply with the rules of various regulatory bodies without these agencies detecting the continuing fraud.

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* It is well settled that "[a] scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy and the overt act of one partner is attributable to all. Pinkerton v. United States, supra, 328 U.S. at 647; Silkworth v. United States, 10 F.2d 711 (2d Cir. 1926); Blue v. United States, 138 F.2d 351, 358 (6th Cir. 1943); Babson v. United States, 330 F.2d 662, 665 (9th Cir. 1964); United States v. Grow, 394 F.2d 182, 203 (4th Cir.), cert. denied, 393 U.S. 840 (1968); United States v. Cohen, 516 F.2d 1358 (8th Cir. 1975). These cases make clear that the nature of proof and the manner in which evidence is admitted is the same in conspiracy and multi-defendant mail fraud trials.

In that connection, proof as to how he helped to shade and modify AMREP practices without changing the central purpose and effect of the fraud, and the significance of his role in continuing the fraud will be essential to the Government's case. Friend's work will be shown in part by comparing AMREP's activities and the fraud before and after Friend joined the scheme.

The entire scheme to defraud is admissible as background, to prove one element of the crime and to show Friend's knowledge and intent. Moreover, once independent evidence shows Friend's role in the scheme, the entire scheme is admissible directly against him as the acts of co-conspirators. The government's proof whether against Friend alone or against all defendants will be quite similar. It would be folly to try two or more times identical cases, involving many witnesses and documents and lasting two to three months, when most if not all of the evidence is admissible against all parties in a joint trial. Friend attempts to portray himself as a peripheral defendant when he is not. Rather, he was an important corporate officer who participated in the fraud as a central figure for over seven years. As such he must be tried with the other principal corporate officers.

Compare United States v. Kelly, supra.*

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Friend would suffer no prejudice from a joint trial. This case is not so complex that the jury could not distinguish between the defendants and render a fair verdict as to each on the evidence adduced.

> The experience within this very District has demonstrated the contrary; that is, that judges and juries have competently disposed of cases of the magnitude involved here. United States v. Dioguardi, supra, 332 F. Supp. at 12;

cited with approval by this Court in United States v. Koss, supra, slip. op. at 4. See United States v. Perez, supra (15 defendants, 10,000 page record, 2 months trial). On the contrary, the sacrifice to the legitimate interests of judicial efficiency and common sense would be monumental. Few cases present themselves where the weight to be given such an interest is as high. The Government respectfully urges that in this case this factor alone outweighs whatever

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* Moreover, in Kelly, the defendant Schuck went unmentioned in the trial for 3 months and the trial court received in evidence extensive post-conspiratorial hearsay testimony containing accusations of fraud against him, but inadmissible against him. See 349 F.2d at 756-59. As Judge Learned Hand noted, even as to smaller members of larger conspiracies, sometimes for practical reasons there must be a joint trial or no trial. United States v. Cohn, supra.

legitimate interests have been raised by the defendants, especially upon so insubstantial a showing by the defendants. United States v. Verra, supra.

Defendants' reliance on United States v. Gambrill, 449 F.2d 1148 (D.C. Cir. 1971) and United States v. Kelly, supra, is equally unpersuasive. Gambrill reversed a conviction because of an improper in-court identification and then discussed the need for severance. However, that need was based on a variety of difficulties involved in a joint trial. In particular, the trial court responded to the co-defendant who did not testify but claimed the defendant's alibi witnesses were lying, by giving a limiting instruction which had the effect of repudiating the defendant's witnesses. In reversing, the Court made clear that if the codefendant had taken the stand to repudiate the alibi witnesses and been cross-examined, severance might not have been required. Id. at 1161. Here, if Friend takes the stand and differs with witnesses offered by the defendants he will be subject to cross- examination. The Court recognized that, on this issue, the threshold standard for severance would still require "that the conflicting testimony be such that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Id., at

1161 n. 52.

In United States v. Kelly, supra, the Government's proof in a nine month trial involved a single conspiracy with at least 48 co-conspirators, which had various subgroup affiliates. The defendant Shuck was not mentioned until the fourth month of trial, and his role in the single conspiracy rather than in a much smaller affiliate thereof was tenuous. The Court held that a severance was required after the Government introduced post-conspiracy hearsay statements of Shuck's co-defendants which were inadmissible against Shuck but very damaging to him.* There has been no showing, nor is there reason to believe, that this will occur here. Any incriminating statements from Friend on the witness stand will be subject to full cross-examination and are admissible. Finally, even the Kelly court noted that there was no reason to believe that a severance was required before trial.

Any reliance on McHale v. United States, 398 F.2d 757 (D.C. Cir.), cert. denied, 393 U.S. 985 (1968), is unavailing since the Court held no severance was required.

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* This appears to be a straightforward Bruton problem.

604-31 The Court's dicta that at the very least a defendant seeking severance had to show that the evidence against a co-defendant was "far more damaging," does not find support in the case law and is inapplicable here since the proof at separate trials will be admissible against all defendants in a joint trial and could not possibly prejudice the defendants and prevent a fair trial. Cf. Schaffer v. United States, 362 U.S. 511 (1960).

Defendants have made no showing of prejudice justifying an exception from the widely applied rule that joint defendants in a substantial conspiracy case should be tried together. Proof against all defendants will be similar and extensive and the court's instructions will enable the jury to assess each defendant's as a personal question without prejudice or unfairness of any kind to any defendant. Separate trials are not necessary to protect any legitimate interest of the defendants, but rather will be a gross waste of resources and counterproductive to the public interest and any meaningful presentation of the truth to the jury.

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VIII. DEFENDANTS BLUM AND OBERMAN SHOULD NOT BE SEVERED

Defendant Oberman seeks (1) a severance because he is not named in Counts 71-80; (2) permission to be absent from court during the trial; and (3) notice from the government before evidence is introduced against him so he can come to court if he wishes. Defendant Blum seeks a severance for three reasons: his poor medical condition; to avoid alleged spill-over effect of evidence admissible only against other defendants; and to gain allegedly exculpatory testimony of co-defendants. These claims are frivolous.

FACTUAL BACKGROUND

The Government will prove at trial that the defendants Irving Blum and Herman Oberman were central figures in the scheme to defraud.

OBERMAN

Oberman was a founder and major stock holder of AMREP. He was instrumental in the acquisition and marketing of Rio Rancho Estates. He profited immensely having sold off most of his shares in the company. He was the President in the early 60's and resigned only because the State of New York learned of his earlier felony conviction for grand larceny which Oberman failed to reveal to state authorities*,

* The State of New York specifically asked in its filings whether any officer had been convicted of a felony.

and, therefore, under New York law, Oberman had to resign as an officer of AMREP in approximately 1963. However, Oberman continued to be a moving and active force in the company until his retirement in 1969. Oberman still owns a substantial amount of stock in the company and has not "affirmatively withdrawn" from the scheme to defraud.

BLUM

Blum was also a founder of AMREP and was and is a principle stock holder. Blum has at all times been an officer and director and today is chairman of the board, and a member of the executive committee. He is one of the largest share holders in the company and has been active throughout the entire 14 years that the company was selling land at Rio Rancho.

A. BLUM AND OBERMAN WILL SUFFER NO PREJUDICE FROM A JOINT TRIAL

As participants in the scheme to defraud, virtually all of the evidence admissible against Blum and Oberman's co-defendants is fully admissible against them. They are fully responsible for the acts of their fellow schemers, even if such acts are unknown to them. See pp. 137-38 supra. The fact that Blum claims he concentrated on the financial side of the business does not absolve his responsibility for the fraudulent sales if he is shown

to be a co-schemer. These defendants' attempts to fit within United States v. Kelly, supra, and claim they are peripheral defendants are ludicrous. These defendants were some of the corporate overseers for this entire nefarious swindle. They were not guides on tour buses at Rio Rancho property who can now say they did not know there was a large scale operation going on, which only involved them in a peripheral way. There cannot and will not be any improper spill over because all of the evidence at a joint trial will be admissible at separate trials. Defendants' desire for separate trials will only lead to an almost total duplication of valuable judicial resources but will in no way contribute to fairer trials for anyone. Including Friend's motion for severance, the defendants would have the Court go through four identical trials instead of one.

Although Oberman is not charged in the Interstate Land Sales counts (71-80), his own conduct covers substantial periods of time preceding the passage of that statute, and he is fully responsible for the mail fraud charges right through to the date of the indictment. See pp157-62infra. Since all of the evidence on the mail fraud counts applies to Oberman and is virtually the identical evidence admissible on Counts 71-80, it is hard to see what prejudice Oberman has to claim in a trial where counts 71-80 do not apply to him,

much less how joinder is improper. See, United States v Koss, supra; United States v. Carson, 464 F.2d 424, 436 (2d Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970), aff'd, 441 F.2d 114, 118-19 (2d Cir.), cert. denied, 403 U.S. 932 (1971). There is only one scheme to defraud here, and Oberman is a central member.* The fact that his co-defendants are charged with different additional statutory violations does not change the uniformity and commonality of proof against all defendants, and will not prevent the Court from giving proper instructions so that the jury can render a fair verdict as to each defendant as an individual.

As to Oberman's and Blum's claims of exculpatory testimony from co-defendants, we rest on the discussion on Friend's similar motion, pp. 127-32 supra. We note however, that they have presented the Court with even less information than Friend on the nature, significance and likelihood of such testimony.

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* As seen below, pp. 157-62 infra, he has never withdrawn and therefore although retired is still responsible for the acts of his co-schemers.

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B. DEFENDANT BLUM SHOULD NOT BE SEVERED FROM THE TRIAL ON MEDICAL GROUNDS; OR IN THE ALTERNATIVE, A COURT-APPOINTED PHYSICIAN SHOULD EXAMINE THE DEFENDANT

Defendant Blum moves to sever his case from the trial of his 6 individual and 3 corporate co-defendants based upon his alleged poor medical condition. The defendant's motion is based on the assertion that Blum is suffering from a heart condition and his health will deteriorate as a result of the trial. The Government contends that defendant's motion is without merit and respectfully requests the Court to deny the motion or in the alternative, appoint a physician who, after examining the defendant, will submit to the Court his medical findings and conclusions.

On behalf of his severance motion, defendant Blum submits the affidavits of his attorney, Mr. Hoffinger, and Dr. Jacob I. Hirsch. Dr. Hirsch, in essence, states Blum has a heart disease, which "in a protracted trial poses a real danger to his health. There is a good chance that his heart would suffer and that his cardiac status would be impaired." While the Government does not challenge Dr. Hirsch's credentials, we do contend that (1) the affidavit is insufficient to justify the severance sought and (2) at the very least it calls for the appointment of other

learned doctors for an examination of the defendant Blum.

The Government concedes that the Court has discretion to grant the instant severance motion. However, the determination of competence to stand trial is, of course, a factual issue. United States v. Knohl, 379 F.2d 427 (2d Cir.); United States v. Armone, 363 F.2d 385, 403 (2d Cir.), cert. denied, 385 U.S. 957 (1966); United States v. Shotwell Mfg. Co., 287 F.2d 667, 672 (7th Cir. 1961), aff'd on other grounds, 371 U.S. 341 (1963); Stein v. United States, 263 F.2d 579, 581-82 (9th Cir. 1959); United States v. Alker, 260 F.2d 135, 157 (3d Cir. 1958), cert. denied, 359 U.S. 906 (1959); as well as determining whether the defendant has met the burden of proof, United States v. Tom, 340 F.2d 127, 128 (2d Cir. 1965); Johnston v. United States, 292 F.2d 51 (10th Cir.).

In deference to the learned doctor's affidavit, the Government contends that this burden has not been fully met. We are told nothing about Blum's current daily activities or his exercise regimen. We do not know how long Blum has had his heart problem; whether the condition has changed or remained stable; what, if any, heart problem Blum had while he was President of AMREP; how, if at all, his AMREP activities affected his heart or vice versa; and what, if any, changes Blum has had to make in his own activities in light of his heart problem.

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There are no objective facts as to his current condition; no evaluation of the relative severity of his illness; and no prognosis of possible future changes in Blum's condition.* Blum's papers are significantly lacking in affidavits from any doctors who have been treating Blum as a patient and are more familiar than Dr. Hirsch with his problems. We do not know what treatment or hospitalization, if any, Blum has needed.

Finally, nothing is said about what medical supervision and precautions could be used at trial to permit Blum to go to trial without any unreasonable danger to his life. Dr. Hirsch does not say why any of the methods commonly employed by Judges in this courthouse in similar medical situations would not work here.

In light of the above, the Government submits that Blum has made an insufficient showing to support his severance motion and therefore it should be denied outright. The defendant also fails to note that while the trial of the instant case may take six to eight weeks for the Government's case, there is no assurance that a separate trial as to him would be appreciably shorter as would allow him to better "endure" the proceedings. See p p. 145-47 , supra.

* It seems fair to take note of the fact that people commonly suffer heart attacks and then return to full and active schedules. Presidents Eisenhower and Johnson are examples, and the office of the United States Attorney has had one assistant do so in the last two years.

The Government further submits that Blum's ailment is hardly of such a nature as to warrant granting the relief requested by the defendant.

Blum's position advances no reason to conclude he believes he will even be able to stand trial. Although Blum would never admit it, it is clear on the basis of this affidavit that his argument forces the Court to make one of two choices: try Blum now with his co-schemers or never try him.

A very similar situation was presented in United States v. Sweig, supra. There, a 71 year old attorney suffering from a progressively worsening coronary artery disease moved for severance on the ground that he was physically incompetent to stand trial and his condition, when aggravated by emotional stress, i.e., long trial, could result in myocardial infarction or even death. Judge Frankel, in denying the motion after an evidentiary hearing, stated:

> It is clear that the choice confronting us is realistically between a trial and no trial, not between the alternative times for going ahead. Whatever its severity, Voloshen's condition is almost certain to be progressive. If he is deemed unable to stand trial now, the determination will amount to a decision that he may never be tried rather than a postponement to a later date. 316 F.Supp. at 1166-1167.

Judge Frankel adopted sufficient safeguards to protect Voloshen

at trial and denied the motion for severance. The affidavit here is unclear as to when, if ever, any significant difficulties or restrictions were directly caused by Blum's heart condition. And, again, it must be emphasized, the absence of many important facts suggests that the conclusion of the affidavit is, to say the least, invalid. United States v. Alker, supra.

In sum, the affidavit of Doctor Hirsch indicates only that the defendant suffers from a heart problem. The Government contends that a showing of such illness per se is not sufficient to support a conclusion of incompetence to stand trial. United States v. Tom, supra. Moreover, the most favorable conclusion to the defendant that can be drawn from the affidavit is that he is currently suffering from an illness which must be looked after at trial. The Government submits that the Court can take the necessary precautions, such as having medical services available, to guard against the possible outbreak of any unpredictable episode of heart pain. See, e.g., United States v. Sweig, supra; United States v. Armone, supra; United States v. Doran, 328 F.Supp. 1261 (S.D.N.Y. 1971); United States v. Marando, 73 Cr. 79 (S.D.N.Y.), aff'd, 504 F.2d 126 (2d Cir. 1974) (defendant brought to court on a stretcher, and resided in the hospital and observed by medical personnel during trial).

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If the Court does not deny the defendant's motion outright, the Court should also consider the Government's alternative request to appoint expert doctors to examine Blum and order an evidentiary hearing to determine the medical health of the defendant. As the Government contends, the defendant has failed to meet his burden of proof in establishing that the defendant's heart condition prevents him from participating in a long trial. In view of this fact, only an evidentiary hearing can serve as the basis for meeting that burden. See, United States v. Adams, (71 Cr. 38, S.D.N.Y., Memorandum Opinion of Judge Frankel filed July 19, 1971), and cases already cited in this memorandum.

Furthermore, the Court should also consider other factors as well, e.g., the magnitude and seriousness of the case, see, United States v. Sweig, supra; United States v. Doran, supra; and the defendant's relation to the other defendants and his role in the alleged scheme. There can be no dispute as to the seriousness and gravity of the charges. Blum is charged with a massive $200,000,000 fraud of over 45,000 people. There is a meaningful public interest in prosecuting such serious crimes. Additionally, Blum's alleged role for over fourteen years is not to be considered lightly nor as that of a minor peripheral figure. To sever this case would result, at least, in the other defendants'

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obtaining a dress rehearsal of the Government's case prior to their trial, or, as is likely, that Blum will never be brought to trial. A severance will not produce a trial which will be any easier for Blum to bear. It will only prevent any trial at all.

For the foregoing reasons, the Government respectfully submits that the Court should deny the defendant's motion, taking precautionary arrangements which will safeguard the defendant from excessive physical stress when and if trial of the case occasions such stress; or in the alternative, order an evidentiary hearing to determine the factual issues.

C. THE DEFENDANT OBERMAN'S ATTENDANCE AT TRIAL SHOULD BE REQUIRED

Defendant Oberman seeks to be absent from the trial for reasons of health. The Government opposes this motion and adopts in opposition thereto the foregoing analysis of defendant Blum's motion for severance for medical reasons. While Rule 43, Fed.R. Crim.Proc., may permit a defendant in a felony case to waive his presence after the commencement of trial, the Second Circuit has ruled to the contrary. United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1971). The Government submits that in any event it is the rare case where the courts should permit this to happen, and that it would be improper to do so here.*

* The cases cited by Oberman deal with continual prosecutions in the face of flight or misbehavior in court by a defendant.

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12 Oberman has made no showing why he should be treated specially and be permitted to stay away from the trial which all of his co-defendants will attend. His health grounds are minimal, and the anxiety of the outcome of the trial will be present even if he is absent. Oberman is a very wealthy man and any inconvenience he and his family will incur by travel between New York and Florida is minimal and insufficient to justify his absence.

There are ample affirmative reasons why his presence is required. It would be a substantial and inappropriate burden on the Government to notify a defendant each time in a trial such as this when testimony will be offered against him. This will present havoc to the Government's preparation and presentation of its case. Moreover, since lawyers frequently disagree about what evidence is admissible against which defendants, this will lead to innumerable disputes which will delay the trial and be a great waste of the Court's time.

We submit that Oberman's absence will also confuse the jury by unfairly differentiating between defendants. This is bound to improperly and unfairly imply to the jury that the charges as to Oberman are minor, unimportant and not worthy of his presence in court, or in fact that the bulk of the evidence is not really admissible against him because

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he is absent. Moreover, in the event that Oberman testifies, the Government's cross-examination of him will be unfairly impeded and will be made less effective, because Oberman, having been absent for much testimony, will not be subject to explicit questions concerning testimony at the trial. Cf. United States v. Fitzpatrick, supra.

In summary, Oberman does not have a right to be absent. Moreover, he has made a totally insufficient showing to justify the extraordinary and unprecedented step of allowing him to absent himself at will from the trial and cause the Government and the trial court incalculable unnecessary difficulties during the course of the trial. Oberman's minor inconvenience is no different than that of any defendant in a large criminal case. It would be improper to grant Oberman the special treatment he requests.

IX. THE INDICTMENT OF OBERMAN IS NOT BARRED BY THE STATUTE OF LIMITATION

The defendant Oberman contends that since his last work for AMREP was in 1969 the indictment returned on October 28, 1975, is barred by the statute of limitations and must be dismissed as against him. The Government opposes this motion on the grounds that a long line of authority has established that a coschemer must show that he has affirmatively withdrawn from the venture in order to successfully plead the statute of limitations. Oberman's motion overlooks this governing principle, and so, of course, fails to make the requisite showing.

The scheme here involved many coschemers responsible for each other's conduct in furtherance thereof over the course of many years. Generally, to defend against charge that the scheme is barred by the statute of limitation, the Government must show that the scheme continued within the five years prior to the return of the indictment, and that there were mailings in furtherance of the scheme within that period. See, Grunewald v. United States, 353 U.S. 391 (1957). The indictment has charged, and the Government will prove, fraudulent conduct within this time period which was contemplated by the objective of the scheme. See, United States v. Sarantos, 455 F.2d 877 (2d

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Cir. 1972). Of course, it is irrelevant that any particular coschemer is not familiar with every step taken to achieve the scheme's goals. United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973); and cf. United States v. Cobb, 446 F.2d 1174, 1177 (2d Cir.) cert. denied, 404 U.S. 984 (1971). In the instant case, the overall methods and participants remained essentially constant well into the statutory period, even though with the passage of the Interstate Land Sales Act, the scheme found itself in violation of another statute.

Oberman fails to realize that to succeed with a statute of limitations defense, he must meet the stringent requirements imposed by the Supreme Court and must prove to the jury that he took affirmative action to withdraw successfully from this scheme.

> Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no position to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. Hyde v. United States, 225 U.S. 347, 369 (1912)(emphasis added).

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As the Court noted in Pinkerton v. United States, supra, 328 U.S. at 646. "So long as the partnership in crime continues, the partners act for each other in carrying it forward," unless affirmative actions establish withdrawal.

Defendant Oberman must make a substantial showing to prove withdrawal. Those, like Oberman, a substantial stock holder, and one of those at the core of the scheme, must overcome the presumption of continuity in the scheme. United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). Here as in Borelli, the object of the conspiracy is the complete sale of the acquired raw material: Rio Rancho grazing land. As in Borelli, inactivity and the absence of personal conduct within the statutory period do not prove withdrawal since the goal of the scheme has not yet been achieved.

It is well settled that

> the burden of establishing an effective withdrawal from a conspiracy rests upon the defendant. United States v. Markham, 193 F.2d 574, 576 (2d Cir.), cert. denied, Livolsi v. United States. 343 U.S. 979 (1952); United States v. Compagna, 146 F.2d 524, 527 (2d Cir. 1944), cert. denied, 324 U.S. 867 (1945); and the mere cessation of activity in furtherance of the conspiracy is not sufficient to carry this burden and to start the running of the statute [of limitations] United States v. Borelli, 336 F.2d

376, 388 (2d Cir. 1964), cert. denied, Cinquergrano v. United States, 379 U.S. 960 (1965).

United States v. Goldberg, 401 F.2d 644, 648-49 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969).

See also, United States v. Pearson, 508 F.2d 595, 597 (5th Cir. 1975); United States v. McGuire, 249 F.Supp. 43 (S.D.N.Y. 1165), aff'd, 381 F.2d 306, cert. denied, Perry v. United States, 389 U.S. 1053.

The defendant must show his withdrawal was affirmatively undertaken and not merely some sort of passive inactivity. The offender must clearly communicate abandonment or make a clean breast to the authorities. See United States v. Colasurdo, supra. Even an arrest, United States v. Pearson, supra,, or incarceration, United States v. Cohen, 516 F.2d 1358 (8th Cir. 1975); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), is not sufficient by itself to establish withdrawal. There must be action tending to defeat, or a good faith disavowal or repudiation of the conspiracy. Eldridge v. United States, 62 F.2d 449, 452 (10th Cir. 1932); United States v. Dubrin, 93 F.2d 499, 504 (2d Cir.), cert. denied, 303 U.S. 646 (1937); United States v. Borelli, supra; and United States v. Nowak, 448 F.2d 134, 139 (7th Cir. 1971). As the Eighth Circuit recently noted in United States v. Cohen, supra, 516 F.2d at 1365,

Those cases which have found withdrawal

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from mail fraud schemes, such as Glazerman v. United States, 421 F.2d 547, 551-52 (10th Cir. 1970), and Blue v. United States, 138 F.2d 351, 362 (6th Cir. 1943), are distinguished by the minor role in the schemes played by the defendants in those cases.

One thing Oberman, a former director and President of AMREP and substantial stock holder, is not, is a minor figure. As in Cohen, he is one of the kingpins, and examination of similar situations reveals how enormously high Oberman's burden really is. In Eldridge v. United States, supra, the defendant, three years before the end of a twelve year conspiracy, told his colleagues he would not assist them to embezzle more funds. This was held not to be withdrawal since he knew they would continue to conceal the the bank embezzlements, and he did nothing to stop or dissent from further concealment of the crime. A defendant's "declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse." Id., 62 F.2d at 451.

Similarily in United States v. Dubrin, supra, the defendant left the offending corporation two years before the conspiracy ceased, but since there was no repudiation there was no withdrawal. In United States v. Keenan, 267 F.2d 118 (7th Cir.), cert. denied, 361 U.S. 863 (1959), the

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-6 defendant's departure as president of the corporation came five years before the crime ceased; yet he continued to received payments for his past efforts. Having done nothing to disassociate himself from the conspiracy, he was not entitled to take refuge in the statute of limitations. Finally, the Government relies on Reisman v. United States, 409 F.2d 789, 793 (9th Cir. 1969), which is on all fours with the instant case.

> Although appellant Reisman resigned as president and director of the Gamble Land Company and ceased to participate in the company's day-to-day business operations, he remained a major stockholder and took no affirmative action to disavow or defeat the promotional activities which he had joined in setting in motion. We think more was required to terminate his liability for the continuing conduct of his confederates.

The evidence at trial will show that Oberman, at a minimum, helped set this fraud in motion, was a primary participant therein for many years and continues as a beneficiary. On the facts before the Court now there is no basis to dismiss the indictment as barred by the statute of limitations. This is an affirmative defense that can only be raised at trial.

X. THE DEFENDANT FRIEND WAS PROPERLY WARNED BY THE GRAND JURY

The defendant Friend contends the indictment is invalid against him because he was not properly warned before testifying before the Grand Jury. This argument is frivolous and without factual or legal foundation.

Factual Background

A careful review of the facts is necessary to place this claim in context. On January 28, 1975, defendant Friend was called before the Grand Jury and asked certain questions solely concerning whether there had been obstruction of justice in the lack of production of documents by AMREP in response to a Grand Jury subpoena duces tecum. Before his testimony he was given the following full and sufficient warnings by the Assistant United States Attorney:

> Q. Mr. Friend, you are appearing this morning pursuant to a Grand Jury subpoena before a Federal Grand Jury that is investigating possible obstruction of justice in connection with Section 1503 of the United States Code Title 18 and that section makes it a criminal offense for anyone to corruptly influence, obstruct or impede the due administration of justice, and that a violation of Section 1503 is punishable by a fine or imprisonment.
>
> This Grand Jury is investigating a possible violation of Section 1503, and we do not know what the outcome of this investigation will be, nor do we know whether it will be determined by this Grand Jury whether that statute has been violated, and if it has been violated, whether you played a role in that.

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Accordingly, I would like to advise you that you have a constitutional right to refuse to answer any question which in your opinion may tend to incriminate you personally.

Do you understand that?

A. Yes, I do, Miss Hynes.

Q. And anything you say here this morning should be said voluntarily and of your own free will.

Do you understand that?

A. Absolutely. Yes.

Q. Are you represented by an attorney, Mr. Friend?

A. No, I am not. I am an attorney.

Q. Are you a member of the Bar of the State of New York?

A. I'm a member of the Bar of the State of New York and Bar of Massachusetts.

I'm also a member of the Bar of the U.S. Supreme Court and of the Bar of the United States Court of Appeals in the First Circuit in Boston, Second Circuit in New York, Third Circuit in Philadelphia, the Fifth Circuit in New Orleans, the Sixth Circuit in Cleveland, and the Seventh in Chicago.

Q. If with respect to any questions that I put to you you wish to be excused to consult with an attorney, you may do so, and you simply can state to me that you wish to be excused and to consult an attorney, if that's your desire.

A. Thank you.

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Q. Because you are giving sworn testimony before a Grand Jury, I would also like to advise you that it is a separate Federal offense to willfully misstate a material fact which at the time you state it you know it not to be true, and what we are talking about is perjury.

Do you understand that?

A. Yes.

(G.J.Tr. 1-3)

He was in essence, therefore, warned that he could be indicted for obstruction of justice, which the Grand Jury was investigating or for perjury; that he had a constitutional right to refuse to answer any question that incriminated him personally; that he could consult with an attorney outside the Grand Jury room before answering any question; and that all statements should be voluntary. After stating that he "absolutely" understood his rights, and after advising the Grand Jury that he was a member of the Bar of the States of New York, and Massachusetts, the United States Supreme Court and six United States Courts of Appeal, this experienced attorney practicing "actively in the state and federal courts for twenty-seven years"* proceeded to testify concerning the obstruction of justice inquiry.

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* Glendon affidavit, ¶3 note.

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Friend's Memorandum of Law claims three deficiencies in his Grand Jury Warnings: they related only to obstruction of justice charges (p. 11); he was not told "he had a right to remain entirely silent" (p. 11); and he was not told he was a target in the mail fraud investigation (p. 14). Friend's own affidavit on behalf of this motion carefully makes no claim that he did not understand the full range of his constitutional rights when he testified on January 28, 1975. Moreover, he states that he knew "that the subject of this hearing could involve me personally. I told Mr. Parker that I would appear and that I did not intend to retain a personal attorney concerning my appearance." (¶4).

Arkin's affidavit on behalf of this motion concedes that during the Grand Jury investigation he represented Messrs. Carity, Hoffman, Blum, and Howard and Daniel Friedman, "as well as other officers of AMREP who were potential targets of the investigation." (¶2). He makes no claim that any principal corporate officer was ever explicitly warned that he was a target of the mail fraud investigation; only that Friend never was so informed prior to January 28, 1975. In response to his own inquiry on that date, Ms. Hynes informed Mr. Arkin that "she could not say at that time that any of my clients were not targets

-214 ..... that she considered Mr. Friend in the same light as the others." (¶6).

Mr. Friend's warnings and the communications concerning him are completely consistent with the status of the investigation and the Government's stated position throughout the investigation. As Ms. Hynes' affidavit makes clear, a Grand Jury began investigating AMREP's activities in March, 1974, and a second Grand Jury concluded its work as to AMREP 20 months later when this indictment was returned.* The first Grand Jury was investigating AMREP's sales practices and when its term expired, it was still gathering evidence, had not returned an indictment, and obviously had not determined what, if any, responsibility attached to any particular corporate officer.

Therefore, as each of the corporate officers were called before the first Grand Jury they were not told that they were targets of the investigation, but only that (1) there was an investigation into possible violations of the federal anti-fraud statutes; (2) they could refuse to give

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* Actually there were two Grand Juries. The first Grand Jury heard evidence until February, 1975 and then an Additional Grand Jury assumed full responsibility for the investigation. The evidence presented to the first Grand Jury, including Friend's testimony, in January, 1975 was placed before the second Grand Jury. Hynes Aff. ¶ 8 .

answers which incriminated them personally; and (3) they could be indicted for perjury for any false and misleading statements.* Hynes Aff. ¶ 3. Mr. Arkin, stating that he represented the corporation and all AMREP officers that were potential targets, over the course of the investigation, beginning in March, 1974, repeatedly tried to learn from the Government who was a target of the Grand Jury's inquiries. Hynes Aff. ¶ 4. The substance of the Government's response was always: No determinations have been made. It depends on the evidence developed. Hynes Aff. ¶ 4.

The simple fact is that at the time Solomon Friend testified in January, 1975, the Grand Jury had not focused on Mr. Friend as a target of the underlying investigation. Hynes Aff. ¶ 5. It had, however, decided to find out whether justice had been obstructed when AMREP failed to produce a planning study covered by a subpoena duces tecum, and since one witness told the Grand Jury that the sought after report had been in Friend's possession after the return date of the subpoena, Friend was called to testify, and was told about this inquiry and his potential exposure.

* All defendants, other than Friend, pleaded the Fifth Amendment to all questions. In chronological order, Daniel and Howard Friedman appeared on April 16, 1974; Chester Carity and Henry Hoffman on July 10, 1974; and Irving Blum on September 24, 1974. Herman Oberman was called to testify on July 8, 1975, shortly before Friend's second appearance, and he like Friend, was given an explicit target warning and pleaded the Fifth Amendment.

Hynes Aff. ¶ 5. The Grand Jury then asked Friend questions solely about the production of documents.

After Friend's testimony on January 28, Mr. Arkin made another inquiry about Grand Jury targets and Mr. Friend, and he was told that all corporate officers were in the same position, but the Government could not say whether any were or were not targets of the underlying investigation. Hynes Aff. ¶ 6. Thereafter, Friend retained Mr. Glendon as his counsel and in response to his inquiry, Ms. Hynes conveyed to him the same message: the investigation is continuing and no determination has been made one way or another. Hynes Aff. ¶ 7.

Some six months later, in July, 1975, after more investigation by the Grand Jury, Mr. Friend was called before the second Grand Jury and testified then and on nine subsequent occasions. On July 24, 1975, he was explicitly told that he was a target of a Grand Jury investigation into interstate land sales, mail fraud and conspiracy violations. He was given a warning of his constitutional rights and again he willingly and freely and knowingly waived those rights, and had his attorney, Mr. Glendon, outside the Grand Jury room for consultation. (G.J. Tr. 3-5). At each subsequent appearance, Mr. Friend confirmed that he previously waived his Fifth Amendment rights. Hynes Aff. ¶ 7.

In July, 1975, Mr. Arkin and Jacobs, Persinger & Parker, Esq., counsel for AMREP, asked permission to submit a brief to the United States Attorney. An extensive brief arguing factual and legally against any indictment was submitted in the beginning of August, 1975. Hynes Aff. ¶ 9.

The Grand Jury continued to gather evidence and the office of the United States Attorney continued to evaluate all of the evidence and the brief submitted and did not reach a decision concerning precisely which persons it would seek an indictment against until approximately one week before the indictment was returned. Hynes Aff. ¶ 9.

In summary, at the time he appeared before the first Grand Jury on January 28, 1975, Mr. Friend was not a target of the Grand Jury's fraud investigation. Accordingly, there was no reason to give Friend any explicit target warning at all. He was in the same light as all principal corporate officers of AMREP, in that AMREP's conduct was the subject of inquiry. As the corporation's general counsel he obviously knew that the Grand Jury was examining AMREP's operations for possibly fraud. He was told no more or less than other principal corporate officers when they were called to testify. His protest now that he was not told there was a fraud investigation is absurd. Moreover, in January, 1975, the first Grand Jury asked Friend only about matters involving the obstruction of justice in the production of documents. As to that matter, he was informed the Grand Jury was investigation his role. When he next appeared six months later before a different Grand Jury which was continuing the fraud investigation, Mr. Friend was told he was a target and he was explicitly warned. His arguments as to warnings are completely without merit.

ARGUMENT

While defendant Friend cites an assortment of authority far afield, it is well settled that the Sixth

Amendment right to counsel does not attach to persons appearing before the Grand Jury. See p. 95 supra; In re Grobon, supra; United States v. Duvall, supra; Perrone v. United States, 416 F.2d 464, 465-66 (2d Cir. 1971); United States v. Corallo, supra.

It is equally well settled that a potential defendant or target of a Grand Jury's investigation may be subpoenaed to testify before the Grand Jury. United States v. Jacobs, ___ F.2d ___, Dkt. No. 75-1319 (2d Cir. Feb. 24, 1976); United States v. Wolfson, 405, F.2d 779, 784 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969); United States v. Fortunato, 402 F.2d 79, 82 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); United States v. Capaldo, 402 F.2d 821, 823-24 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969); United States v. Irwin, 354 F.2d 192, 198-99 (2d Cir. 1965); United States v. Winter, 348 F.2d 204, 207-08 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

It is abundantly clear that Friend was properly and adequately warned of his rights against self-incrimination, that he knew what those rights were and that he intentionally, knowingly and voluntarily waived them. Friend's affidavit does not dispute this. Having been warned that he can decline to answer any question which incriminates him, it is absurd to suggest Friend did not know he could remain silent. Defendant's memorandum of law simply cannot establish facts which Friend fails to allege by affidavit. Since the defendant may be subpoened before

the Grand Jury, he obviously does not have the same absolute right to silence possessed by the defendant on trial, but only the right against self-incrimination. United States v. Scully, 225 F.2d 113, 115 (2d Cir. 1955); United States v. Benjamin, 120 F.2d 521, 522 (2d Cir. 1941). It is equally clear that the Second Circuit has discerned no difference between the magical phrase "right to silence," as opposed to "right not to personally incriminate oneself." United States v. Irwin, supra, and United States v. Capaldo, supra (right to remain silent) with United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970), and United States v. Cleary, 265 F.2d 459 (2d Cir. 1959) (right not to answer incriminating questions). United States v. Corallo, supra, refers to a right to remain silent, but the actual grand jury warning referred only to incriminating answers.

As the Supreme Court has recently noted, the full litany of Miranda "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." Michigan v. Tucker, 417 U.S. 433, 444 (1974). This Circuit has noted that witnesses questioned by the Grand Jury are not in custody or restraint, have no right to counsel, and therefore "the Miranda rule

-214 has no application to the circumstances of this case." United States v. Corallo, supra, 413 F.2d at 1330. The issue is whether the witness knew his rights and properly waived them. United States v. Wolfson, supra, 405 F.2d at 785. It is certainly pertinent to such a determination that the witness knew his rights and properly waived them. Id. It is certainly pertinent to such a determination that the witness was a "sophisticated" person and an experienced attorney. United States v. Corallo, supra, 413 F.2d at 1329; United States v. Benjamin, supra. Friend cannot, and does not, claim that he did not know his self-incrimination rights and did not properly waive them. The "predicament of [Friend] was in no sense due to any deviation from duty by the prosecutor, but solely to the over confidence and arrogance which led [him] to believe [he] could [testify himself] out of trouble." United States v. Corallo, supra, 413 F.2d at 1330.

As to target warnings, Friend's position is equally without merit. When he first testified, Friend was warned about the obstruction of justice inquiry by the Grand Jury and that he could be indicted if the evidence so warranted. Friend was then asked only about the production of documents and the obstruction of justice issue. This was

the most that he had to be told at that time, because as the Hynes affidavit makes clear, the investigation had not focused on Friend as a target in the underlying investigation. As to that, the Grand Jury was gathering evidence and seeking to determine if there were criminal violations. This Grand Jury ceased its work in February, 1975, without returning any indictments in this case. Friend, as AMREP's general counsel, of course knew about the purpose of the underlying inquiry. At that time, when inquiry was made to the Government as to Friend's position with respect to the underlying investigation, Ms. Hynes stated that Friend was in the same position as any other principal corporate officer, none of whom had been told they were or were not targets. Thereafter a second Grand Jury was convened to continue the investigation, and six months later after it has gathered more evidence, Friend was called to testify on the underlying fraud charges. At that time he was a target and he was so warned.* Once again he knowingly waived his rights.

On February 24, 1976, this Circuit, under its supervisory powers, held for the first time that where a person called before the Grand Jury is known to be a potential defendant, he should be warned that he is a target or subject of the investigation. United States v. Jacobs,

* Friend was treated exactly as Oberman was when Oberman appeared before the Grand Jury on July 8, 1975. See p. 168 note supra.

supra. The Government conceded that Jacobs was not just another witness, but a "putative defendant," since when she was called to testify, the Government had a tape recording of a threatening phone call made by her. Under such circumstances, the Court held that she should have been told she was a target, and not just of her rights against self-incrimination and to consult an attorney. The Court ruled under its supervisory powers, and expressly declined to hold that the Fifth or Sixth Amendments required any such result.*

The Government's warnings to Friend in this case are completely in accord with the requirements of Jacobs**. Friend knew the Grand Jury was investigating whether AMREP's practices were fraudulent. When he was called before the first Grand Jury conducting that inquiry he was questioned only about possible obstruction of justice. In addition to being told of his rights to counsel and against self-incrimination, he was told about the purpose of the questioning

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* Jacobs does not hold that a Grand Jury witness, like a defendant, has an absolute right to remain silent even if the answers are not incriminating, and therefore did not overrule sub silentio the line of authority cited at pp.171-73 supra.

** The Government contends that Jacobs was incorrectly decided. This issue is currently awaiting decision by the Supreme Court in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975) (argued Nov. 5, 1975). See pp.179-80 infra.

and that his role was under investigation. Nothing more was required. The Grand Jury had not focused on him as a target of its fraud inquiry and obviously had not decided to indict him. Any further warnings that he was a target of that inquiry would have been false and misleading as unsupported by the facts, and unnecessary in light of Friend's knowledge and the limited purpose of the questioning at that time. When Friend became a target of the fraud inquiry after further Grand Jury investigation, he was so informed before he testified. Each time, Friend eagerly and knowingly waived all of his rights and jumped at that chance to testify and exculpate himself. See United States v. Corallo, supra, 413 F.2d at 1330.

Even if Jacobs were inconsistent with the warnings given here, dismissal is not permitted. First, the Jacobs Court only dismissed the perjury count of the indictment which was based on the testimony given without the warning. The Court left standing the indictment on the underlying charge of using interstate commerce to threaten another person. Here too there would be no basis for dismissing the fraud charges against Friend. Contrary to Friend's glib assertions, he was under no compulsion to testify in July, 1975. If he had pleaded his Fifth Amendment rights, the Grand Jury would have been instructed not to draw any

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inferences therefrom, as it was instructed with other witnesses. This Grand Jury, which returned the indictments, had only heard Friend's earlier testimony, but had not seen him testify. Friend testified for his own reasons, apparently confident he could talk his way out of trouble.

Secondly, the Second Circuit has held that where it exercises its supervisory powers explicitly to require prosecutors to follow certain procedures before the Grand Jury, that these procedures only apply prospectively. United States v. Catino, 403 F.2d 491 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969) (heresay rules do not apply to indictments returned less than one week after the Court's decision). Therefore, the proscriptions of Jacobs do not apply to Friend's Grand Jury appearances in January, 1975.

Jacobs aside, the Government's treatment of Friend was proper and did not violate his rights. The two cases relied on most by Friend not only do not support his contention, but instead support the Government's position. In United States v. Scully, supra, the defendant had been called before the Grand Jury and testified without warnings, but not "unaware of his rights." 225 F.2d at 114. Despite precatory language in dicta heavily relied on by Friend, the Court's holding supports the Government's position entirely.

d-214 The Court did not have the issue of warnings before it, and therefore did not require warnings for Grand Jury proceedings. Instead, the Court concluded:

> And so we now hold that the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury. Id. at 116.

Even Judge Frank's concurring opinion makes it clear that although the Grand Jury had heard testimony of numerous criminal acts by the defendant at the time of his testimony, it did not make it evident that the defendant was to be named in the indictment. Id. at 118. It is far less evident that Friend was to be indicted when he first testified. The investigation continued thereafter for months before calling him. Any more warnings on January 28, 1975, were not legally required, would have been inconsistent with the factual progress of the investigation, and would have been irrelevant to the subject matter of the examination on that date.

United States v. Mandujano, supra, also supports the Government's position.* The Court held that full Miranda warnings were required for a witness who is a

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* See p. 175note supra.

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virtual defendant. To require such warnings the Government had to be satisfied that the witness is guilty before he testifies. 496 F.2d at 1058. The privilege attaches only where the Government: (1) had knowledge the witness had committed a crime; (2) planned to indict; and (3) was gathering evidence against the virtual defendant. Id. at 1053. The investigation must have gone beyond a general inquiry and have focused and centered on the defendant. Otherwise, the Court recognized that the general rule of Scully applies: a Grand Jury witness is not entitled to warnings of right to counsel or his right to remain silent. Mandujano on its facts and articulated principle instructs that the examination of Friend was completely proper.*

The District Court cases cited by Friend are also either distinguishable or supportive of the Government's position in the case at bar. Most of them are simply Fifth Circuit lower courts following the Mandujano precedent of their own circuit,** or another district judge explicitly

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* See United States v. Bonacorsa, F.2d , Dkt. No. 75-1284 (2d Cir. January 9, 1976), distinguishing Mandujano. The Court affirmed although six days prior to the defendant's grand jury testimony the government counsel sought Department of Justice approval for an indictment, and the indictment was returned at the end of the day on which the defendant completed his testimony.

** United States v. Jarrett, 393 F. Supp. 874 (D. Miss. 1975); United States v. Tiemonet, 385 F.Supp. 1042 (E.D. La. 1974); United States v. Prior, 381 F.Supp. 870 (M.D. Fla. 1974).

following Mandujano.* In Jarrett, Tiemont, Prior, and Chevoor, the defendant was about to be indicted and was not given any warning of his right against self-incrimination. In United States v. Kreps, 349 F.Supp. 1049 (W.D. Wis. 1972), the witness was the prime suspect of the investigation.

Friend's reliance on United States v. Pepe, 367 F.Supp. 1365 (D. Conn. 1967), and United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963), is also misplaced. In Pepe, Judge Newman did not pass on the precise form of a warning required for potential defendants, 367 F. Supp. at 1369, and acknowledged that no Second Circuit Decision "has found a violation of the self-incrimination clause for failure to warn a witness that he is a potential defendant." Id. at 1367. The Pepe indictment was dismissed because the witness was threatened with an immunity order and contempt to get him to answer.

In DiGrazia, the witness was neither advised of his right to counsel or his right against self-incrimination. The Government knew what the testimony was going to be and inflamed the jury by asking a variety of unfair questions. These cases are far afield from the facts here.

* United States v. Chevoor, 392 F. Supp. 436 (D. Mass. 1975).

214 Friend cites no case where a court has even come close to holding that a witness in Friend's position, with Friend's knowledge and given the warnings Friend was given, is entitled to have the underlying indictment thrown out. Such a result is not required by United States v. Jacobs, supra, or any other case, and is in fact contrary to Jacobs and well established precedent, as well as common sense. The final word is perhaps best left to Judge Weinfeld:

> Having been fully and adequately advised of his right against self-incrimination and his right to consult counsel, and having been given the substance of the Miranda warnings, it was not additionally required that he be specifically advised he was the target of inquiry and that the grand jury might return an indictment against him. United States v. Potash, 332 F. Supp. 730, 733 (S.D.N.Y. 1971) (footnote omitted).

CONCLUSION

For all of the reasons stated above, the motions of the defendants should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES,
MICHAEL S. DEVORKIN
Assistant United States Attorneys

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- v - : AFFIDAVIT

AMREP CORPORATION, ET AL., : 75 Cr. 1023

Defendant. :

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss. :
SOUTHERN DISTRICT OF NEW YORK)

PATRICIA M. HYNES, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as such I have been in charge of the Grand Jury investigation into the activities of the AMREP Corporation in connection with its sale of lots at Rio Rancho Estates. This affidavit together with the affidavit of Alan J. Kappeler, Assistant Deputy Administrator of the Office of Interstate Land Sales Registration, is submitted in opposition to defendants' motions.

2. A special Grand Jury sitting in this district began an investigation into the activities of AMREP Corporation (hereinafter "AMREP") in March of 1974, and continued its investigation until its term expired in February, 1975, when a new special Grand Jury was impanelled. The second Grand Jury continued the

investigation into the activities of AMREP in connection with its sale of lots at Rio Rancho Estates and returned an indictment on October 28, 1975, against AMREP, Rio Rancho Estates, Inc., A.T.C. Realty Corporation, and seven individual defendants.

3. During the course of the Grand Jury's investigation, officers of AMREP were subpoenaed before the Grand Jury. Daniel Friedman and Howard Friedman appeared before the Grand Jury on April 16, 1974; Chester Carity and Henry Hoffman appeared on July 10, 1974; and Irving Blum appeared on September 24, 1974. All of these individuals refused to testify pleading the Fifth Amendment. All were given substantially the same warning as that given to Chester Carity, as follows:

> Q. You are appearing this morning before a Federal Grand Jury that's investigating possible violations of federal law, including the mail fraud statute and the Interstate Land Sales Act. As with any w ness who comes before the Grand Jury, we'll advise you of your rights, and that is that you have a constitutional right to refuse to answer any question which, in your opinion, may tend to incriminate you, personally. Do you understand that?
>
> A. Yes.
>
> Q. And that because you're giving sworn testimony, that if you wilfully misstate a fact which at the time that you state it you know to be false, that you could be guilty of a separate federal crime that's punishable by fine and/or imprisonment, and what I'm talking about is perjury. Do you understand that?
>
> A. Yes.

Q. And that a record is being made here, so that anything that you do say might be used later against you in a court of law or elsewhere. Do you understand that?

A. Yes.

Q. And that, in short, everything that you do say should be voluntarily and of your own free will. Do you understand that?

A. Yes.

Q. Are you represented by an attorney?

A. Yes.

Q. What is his name?

A. Mr. Arkin [spells].

Q. And is Mr. Arkin present outside the Grand Jury room?

A. Yes.

Q. While the Grand Jury rules do not permit you to have an attorney present in the Grand Jury room, you can ask to be excused with respect to any question that I put to you to consult with your attorney. Do you understand that?

A. Yes.

4. Mr. Arkin, from the beginning of the Grand Jury's investigation in March, 1974, made repeated inquiries of your deponent as to who were the targets of the Grand Jury investigation. The response was always the same, that is, that the Grand Jury was continuing its investigation, that no determination had been made and that a decision as to who was a target would depend upon the evidence, if any, developed by the Grand Jury.

5. In January, 1975, the first Grand Jury subpoenaed Mr. Solomon H. Friend in connection with an inquiry it was conducting concerning possible obstruction of justice due to the initial failure of AMREP to produce a Master Planning Study prepared by Harmon, O'Donnell & Henninger, which study had been subpoenaed by the Grand Jury. Before appearing before the first Grand Jury in January, 1975, Mr. Friend was told the reason for his appearance and the nature of the inquiry. At that time Mr. Friend was not a target of the underlying Grand Jury investigation of AMREP. Mr. Friend appeared before the first Grand Jury on January 28, 1975, and testified after having been told the nature of the inquiry and after having been given the warnings which are accurately set forth in the Government's Memorandum of Law at pp. 163-165. At that time the questions asked related solely to the obstruction of justice inquiry.

6. After Mr. Friend's appearance before the first Grand Jury on January 28, 1975, Mr. Arkin again made inquiries as to who were the targets of the investigation and Mr. Arkin specifically asked about Mr. Friend. I again responded that no determination had been made but that I could not say that Mr. Arkin's clients, that is, Messrs. Howard Friedman, Daniel Friedman, Chester Carity and Henry Hoffman, could be ruled out as possible targets. When specifically asked about Mr. Friend,

I responded that Mr. Friend was in the same position, that is, he could not be ruled out as a target but that no determination had been made. And in fact, when Mr. Friend testified in January of 1975, he was not a target of the Grand Jury's underlying investigation of AMREP.

7. Thereafter, Mr. Friend retained Mr. William Glendon of Rogers & Wells, Esqs. to represent him. In response to Mr. Glendon's repeated inquiries as to the status of Mr. Friend my answer was always the same: no determination had been made. However, in July of 1975, I advised Mr. Glendon that the second Grand Jury wished to have Mr. Friend appear and testify. When Mr. Friend appeared on July 24, 1975 before the second Grand Jury, he was told that he was a target of the investigation and was given the following warnings:

> Q. Mr. Friend, you are appearing before a Federal Grand Jury. You are a target of the investigation of the Grand Jury.
>
> The Grand Jury is investigating possible violations of Federal statutes including the mail fraud statute which makes it a Federal offense to engage in a scheme to defraud and to use the mails in furtherance of a scheme to defraud. It is investigating possible violations of the conspiracy statute, which makes it a Federal offense to violate a Federal statute such as the mail fraud statute.
>
> It is investigating possible violations of the Interstate Land Sales Act, which makes it a Federal offense to engage in a scheme to defraud or a course of conduct that would result in deceit of the purchaser of the lots in a subdivision and also in making it, it would make it a separate offense to wilfully misstate anything in a statement of records or property reports. Those

are generally the statutes that the Grand Jury is has concerned itself with.

As I stated, you are a target of this investigation. Therefore, I would advise you that you have a constitutional right to refuse to answer any question which in your opinion may tend to incriminate you personally.

Do you understand that?

A. Yes, I do.

Q. And that there is a record being made here and anything you do say can be used later against you in a court of law or elsewhere.

Do you understand that?

A. Yes, I do.

Q. And that anything you say here should be said voluntarily of your own free will.

Do you understand that?

A. I understand that, Ms. Hynes.

Mr. Friend waived his Fifth Amendment privilege and testified on ten separate occasions. Herman Oberman was also called before the second Grand Jury on July 8, 1975 and was given target warnings unlike the other officers referred to above who appeared in 1974.

8. The January, 1975 testimony of Mr. Friend before the first Grand Jury was read to the second Grand Jury in April of 1975.

9. In July of 1975, Mr. Arkin and Jacobs, Persinger & Parker, Esqs., counsel for the Corporation, asked permission to submit a brief to the United States

Attorney stating why their clients should not be indicted. The brief was received by the United States Attorney in the beginning of August, 1975. The Grand Jury continued to gather and evaluate evidence and no final determination was made as to whom the Government would seek an indictment against until immediately prior to the return of this indictment on October 28, 1975. The attorneys for the defendants were advised that the United States Attorney would seek an indictment the week before the indictment was returned.

10. During Mr. Friend's appearances before the Grand Jury, he was repeatedly told by your deponent that the Grand Jury did not wish to breach any attorney-client privilege or obtain any information as a result of any "councils of defense".

11. During the course of the Grand Jury's investigation, it was common practice for attorneys or other representatives of AMREP to debrief witnesses outside of the Grand Jury room.

12. On April 24, 1975, Judge Pierce rejected a claim of attorney-client privilege and ordered AMREP to turn over to the Grand Jury compilations of customer complaints prepared by the AMREP Legal Department and distributed to corporate officers. A copy of the transcript of that decision is annexed hereto as Exhibit A.

13. With respect to the claim that the Grand Jury learned about the use of scripts at sales dinners from defendant Friend as a result of alleged breaches in "councils of defense", these scripts of sales dinners were subpoenaed early in the investigation and were before the Grand Jury prior to Mr. Friend's appearance.

14. With respect to the claim that the Grand Jury learned about the depth of the water at Rio Rancho from defendant Friend as a result of alleged breaches of "councils of defense", Neil Godwin, a former employee of AMREP, appeared before the second Grand Jury on July 17, 1975 prior to Mr. Friend's appearance and was questioned about the depth to water at Rio Rancho Estates.

15. At the time of the hearing before Judge Duffy, Mr. Arkin represented Messrs. Howard Friedman, Daniel Friedman, Chester Carity and Henry L. Hoffman.

16. With respect to Mr. Arisohn's claim that the Government, in effect, suborned perjury of Leonard Geller in the Grand Jury, the Government told Mr. Geller that he was at all times to give only truthful information to the Government and to the Grand Jury. Morover, he was told by your deponent and by Mr. Thomas Day Edwards, Chief of the Criminal Division, Office of the United States Attorney, that under no circumstances was he to give false information for any reason against AMREP or any corporate officer.

The Government did not affirmatively mislead the Grand Jury or withhold material evidence from the Grand Jury. Mr. Geller never made any request to give additional testimony to the Grand Jury.

17. At the time the Government spoke to Leonard Geller and at the time Mr. Geller testified in the Grand Jury he was employed by AMREP. I am informed by John H. Doyle, III, attorney for Mr. Geller that when Mr. Geller spoke to Mr. Arisohn on November 11, 1975 he was still employed by AMREP and that sometime thereafter Mr. Geller was fired.

PATRICIA M. HYNES
Assistant United States Attorney

Sworn to before me this
15th day of March, 1976.

NOTARY PUBLIC

JEANETTE ANN GRAYER
Notary Public, State of New York
Qualified in [illegible] County
Commission Expires March 30, 1977

A9166

EXHIBIT "A"

EJC-1

A 9167

April 24, 1974

Hearing

No Jury

Re: Amrep, Inc., Rio Rancho Estates, Inc.

before

Present

Miss Hynes, Miss Reice

Hon. Lawrence W. Pierce, USDJ

A P P E A R A N C E S:

[In Robing Room]

PATRICIA HYNES
Asst. U. S. Attorney

NAOMI REICE
Asst. U.S. Attorney

IRVING PARKER
Attorney

JOAN DACEY
Attorney

FRANK DIAZ
Judge's Law Clerk

G. J. Reporter: E. Cordes

- -

JUDGE PIERCE: Would you let the record reflect that this material which was furnished by counsel to the Court yesterday afternoon is returned to him.

[Material is returned]

JUDGE PIERCE: And I'll have a ruling for you on this as soon as my law clerk gets downstairs on that slow elevator. My plan is to simply put that ruling on the record and then to proceed before the Grand Jury, and we should be out of here in a matter of minutes. The Grand Jury sits mornings daily?

MISS HYNES: Yes.

JUDGE PIERCE: Daily.

MISS HYNES: Tuesday and Wednesday, but they have flexibility in coming in other days

[Judge's law clerk enters with papers]

JUDGE PIERCE: All right. The corporations herein, through their attorney, have asserted two separate bases for their refusal in turning over the requested documents. I will discuss each separately. First, the attorney-client privilege allegation. The general principle with regard to this privilege has been formulated as follows. Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived. After examining the documents in question, and in light of the principle just stated, I have decided that the attorney-client privilege may not be properly asserted herein. It appears that the documents here were prepared by a non-attorney, working in the legal department of one of the corporations. There is no indication on the face of the reports, themselves, that any attorney-provided input went into the preparation of the documents. The reports are in the main straightforward and factual, as opposed to legal presentation of the complaints received. One column of the report deals with the complaint, itself, and the other column with the action that has been taken

with respect to it. There is nothing in these reports which, in the Court's view, is in the nature of legal advice. Moreover, I should also note that a great portion of the communications embodied in the reports come, not from the client, but from third parties; further, the balance of the reports mostly deal with communications from the corporate representatives to third parties. In view of all this, I have concluded that the attorney-client privilege may not be properly asserted here.

The second basis for the refusal to turn over the documents requested is the allegation that they are product protected by the work-product privilege. Assuming for the moment that these documents are, indeed, attorney-produced work product, this allegation, in this Court's judgment, is without merit. In order for these documents to fall under this rubric, it must first be shown that they were prepared in anticipation of litigation. Colton vs. United States, 306 Fed 2nd, 633, 2nd Circuit, 1962. No such showing had been made here. On the contrary, it is quite clear, in the Court's view, that these documents were prepared, not with such a purpose, but were simply meant to inform the appropriate executive officer of the status of the complaints received from the public. Accordingly, I have concluded that the work-product privilege does not attach to these reports. The application submitted to the Court from the Foreman, through Miss Hynes, is granted and the

corporations are ordered to produce the documents requested. The Assistant United States Attorney is requested to submit an order for the Court's signature if required.

AFFIDAVIT OF ALAN J. KAPPELER

Now comes Alan J. Kappeler who being duly sworn, deposes and says that:

1. I am Assistant Deputy Administrator of the Office of Interstate Land Sales Registration (hereinafter, OILSR) of the United States Department of Housing and Urban Development. In the absence of an Administrator, I am serving as Acting Administrator. In that official position, I have direct responsibility for and knowledge of the day-to-day operations of OILSR and the enforcement of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701 et seq. (hereinafter, the Act).

2. I have caused the official OILSR files and records to be searched concerning the Rio Rancho Estates subdivision in New Mexico.

3. A preliminary examination of the files and records confirms the fact that some eleven effective date letters concerning the filing of the Statement of Record and consolidations to the Statement of Record were sent out by OILSR between July 1, 1969, and July 9, 1970, for Rio Rancho Estates.

4. Copies of these letters are attached hereto as exhibits 1 through 11. The July 1, 1969, letter (exhibit 1) is the standard form letter that was sent to all developers at that time when their initial filing became effective with OILSR. The other letters (exhibits 2-11) are also standard form letters designated by OILSR as form letter No. 7 with the exception of the February 10, 1970, letter (exhibit 7) which is a shortened version of form letter No. 7 designated form letter No. 8B. These latter letters were standard form letters which were sent out to all developers by OILSR during that time period to inform them of the effective date of their consolidation to an effective Statement of Record.

5. These letters contained the phrase "This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto . . .". OILSR merely meant

by this phrase that all the disclosure questions had been answered in the format required by the Act and Regulation, and this phrase in no way meant that OILSR took any position as to the accuracy of the disclosures or in any way approved the filing in contravention of the requirements of Section 1417 of the Act.

6. A preliminary examination of the OILSR files and records indicate that there have been four consolidations to the Statement of Record for the Rio Rancho Estates subdivision between July 9, 1970, and March 9, 1976. Copies of form effective date letters for consolidations used by OILSR during that time period are attached hereto as exhibits 12 through 15.

7. A preliminary examination of OILSR's files and records indicate there have been some sixteen amendments to the Statement of Record and Property Report for Rio Rancho Estates between July 9, 1970, and March 9, 1976. Copies of form effective date letters for amendments used by OILSR during that time period are attached hereto as exhibits 16 through 19.

ALAN J. KAPPELER
Assistant Deputy Administrator

Subscribed and sworn to before me this 9th day of March, 1976.

Notary Public

My Commission Expires Nov 14, 1980

A 9173

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

July 1, 1969

IN REPLY REFER TO:
New OILSR Number O-0352-36-8
Old OILSR Number 36-3-ILS

Jeffrey D. Simon, Esquire
Jacobs Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Developer: Rio Rancho Estates, Inc.

Subdivision: Rio Rancho Estates

Dear Mr. Simon:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Statement of Record and the Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of the statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Sincerely,

Alfred Lehnoff
Administrator

Mailed to Mr. [illegible]

EXHIBIT 1

A 9174

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

September 25, 1969

IN REPLY REFER TO:
OILSR No. 0-0712-36-18

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates
(Consolidation)

Jacobs Persinger & Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Gentlemen:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 2

A 9175

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

October 21, 1969

IN REPLY REFER TO:
OILSR No. 0-0757-36-21

Jacobs Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates
Consolidation, Tract T, U, V, W, X and Blocks 123 through 146 of Unit 13

Gentlemen:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 3

A 9176

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

October 24, 1969.

IN REPLY REFER TO:
OILSR No. 0-0773-36-22

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates
Consolidation Unit 22 (Blocks 44 through 63, Tract B and Tract C) Unit 23 (Blocks 45 Through 75, Tracts C, EE and FF

Jacobs Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Gentlemen:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 4

A 9177

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

December 18, 1969

1-10
Rec 12/19/69

IN REPLY REFER TO:
OILSR No. 0-0881-36-25

Jacobs, Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates
Subdivision - Consolidation
Blocks 1 through 36 Tracts A, B, C, and D - Unit 21 and
Blocks 64 through 88 - Unit 2

Gentlemen:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 5

A 9178

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

December 29, 1969

IN REPLY REFER TO:
OILSR NO. 0-0881-36-25

Jacobs Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates Subdivision
Consolidation Blocks 1 through 36
Tracts A, B, C and D Unit 21 and
Blocks 64 through 38 Unit 22

Gentlemen:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Amendment to the Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of an amendment to a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Amendment to the Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of the statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statement therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 6

A 9179

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

February 10, 1970

IN REPLY REFER TO:
OILSR NO. 0-0773-36-3(A)

Edward B. Winslow, Esquire
Jacobs Persinger and Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates

Dear Mr. Winslow:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto, and became effective February 9, 1970.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of the Statement of Record, a change shall occur affecting any material fact required to be contained in the Statement of Record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

A 3B

EXHIBIT 7

A 9180

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

March 20, 1970

IN REPLY REFER TO:
OILSR NO. 0-0073-36-3(B)

Edward B. Winslow, Esquire
Jacobs Persinger & Parker
Attorneys at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates

Dear Mr. Winslow:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision.. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 8

A 9181

DEPARTMENT OF HOUSIN[illegible]AN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411
April 29, 1970

IN REPLY REFER TO:
OILSR NO. 0-0073-36-3(C)

Edward B. Winslow, Esquire
Jacobs Persinger & Parker
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates

Dear Mr. Winslow:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

EXHIBIT 9

A 9182

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D.C. 20411

May 20, 1970

IN REPLY REFER TO:
O-0073-36-3 (D)

Edward B. Winslow, Esquire
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Incorporated
Rio Rancho Estates

Dear Mr. Winslow:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

for Alfred Leitonen
Administrator

EXHIBIT 10

A 9183

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D. C. 20411

July 9, 1970

IN REPLY REFER TO:
OILSR No. 0-0073-56-3(S)
0-0073-56-3

Edward R. Winslow, Esquire
Jaeckle, Fleischmann & Mugel
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates

Dear Mr. Winslow:

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehrenen
Administrator

EXHIBIT 11

A 9184

May 5, 1971

0-0073-36-3(F)

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates, Unit 26,
Blocks 74-183, Portions of Blocks 73,
50 & 52, Unit 25, Blocks 29-141, 143-
160
Portions of Blocks 25, 26, 27 & 142
Letter of May 3, 1971

Jacobs Persinger & Parker
70 Pine Street
New York, New York 10005

Gentlemen:

May 4, 1971.

FORM LETTER #7

FLE:KING:lm 5-5-71
cc: chron
OILSR
Ellsworth
Thompson
Hogue
File

George K. C. Ellsworth

George K. C. Ellsworth
Acting Administrator

EX. 12

A 9185

FORM LETTER 7

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

A 9186

December 1, 1971

OILSR NO. 0-0073-36-3(G)
Hicks

Miss Joan Dacey
Attorney at Law
70 Pine Street
New York, New York 10005

Re: Rio Rancho Estates, Inc.
Rio Rancho Estates

Dear Miss Dacey:

RECEIVED
'71 DEC 1 PM 12:20
OFFICE OF INTERSTATE LAND SALES ADMINISTRATOR

November 30, 1971

FORM LETTER NO. SEVEN (7)

FLE:HICKS:mtm 11-30-71
cc: OILSR
Chron
Mann
Thompson
Hogue
File

Robert S. Thompson

EX. 13

A 9187

FORM LETTER 7

Under the provisions of the Interstate Land Sales Full Disclosure Act, this office has conducted an examination of the Consolidated Statement of Record and Property Report of the captioned subdivision. This examination has revealed that your filing has conformed to the requirements of the Act and the Regulations issued pursuant thereto.

Section 1407(a) of the Act provides that the effective date of a statement of record shall be the thirtieth day after the filing thereof, or such earlier date as may be determined, having due regard to the public interest and the protection of purchasers.

Accordingly, you are hereby advised that the date of this letter is the effective date of the Consolidated Statement of Record filed in connection with the captioned subdivision.

As provided in Section 1407(c) of the Act, if at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement of record, such amendment should be promptly filed. Section 1407(d) provides further that if an effective statement of record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to make the statements therein not misleading, such statement of record may be subject to suspension after an opportunity for a hearing.

Please do not hesitate to contact this office if we may be of service.

Sincerely,

Alfred Lehtonen
Administrator

A 9188

AUG 7 1972

TH

Arthur S. Mantel, Attorney
Amrep Corporation
16 West 61st Street
New York, New York 10023

Dear Mr. Mantel:

Subject: OILSR No. 0-0073-36-3(H)
Amrep Corporation
Rio Rancho Estates
Material Received June 21, 1972

July 21, 1972

CC:
OILSR
Chron ✓
Thompson
File

Form Letter No. Seven (7)

by John E. McDowell

LE:HICKS:olm 8-3-72 Ext. 56570

Ex. 14

A 9189

FORM LETTER 7

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the Consolidated Statement of Record of the captioned subdivision became effective . This letter has no retroactive effect upon your operation or sales, if any, made prior to your registration with this Office.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and Property Report so that such documents may become a part of the filing. The effective date indicated above must appear on the face of the Property Report.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Consolidated Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Consolidated Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading such Statement of Record may be subject to suspension proceedings.

Any questions with regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

George K. Bernstein
Interstate Land Sales Administrator

By John R. McDowell
Deputy Administrator

A 9190

TH

19 OCT 1972

Arthur S. Mantel, Esquire
AMREP Corporation
16 West 61st Street
New York, New York 10023

Dear Mr. Mantel:

Subject: OILSR No. 0-0073-36-3(I), AMREP Corporation, Rio Ranch Estates, filed September 19, 1972, Additional material received October 12, 1972

October 16, 1972

FORM LETTER # 7

cc:
OILSR
Chrono
Thompson
~~Sauerbrunn 10150~~
File

LE:HICKS: dab OILSR 10-16-72 x56571

EX. 15

A 9191

FORM LETTER 7

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the Consolidated Statement of Record of the captioned subdivision became effective . This letter has no retroactive effect upon your operation or sales, if any, made prior to your registration with this Office.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and Property Report so that such documents may become a part of the filing. The effective date indicated above must appear on the face of the Property Report.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Consolidated Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Consolidated Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading such Statement of Record may be subject to suspension proceedings.

Any questions with regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

George K. Bernstein
Interstate Land Sales Administrator

By John R. McDowell
Deputy Administrator

A 9192

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D.C. 20410

IN REPLY REFER TO:

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the above-specified Amendment to the Statement of Record of the captioned subdivision became effective _____. This letter has no retroactive effect upon your operation or sales.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and two copies of the final printed version of the Property Report so that such documents may become part of the filing. This amendment included a revision to the Property Report. The effective date indicated above must appear on the face thereof.

The Property Report shall be in accordance with Section 1710.110, Part B, Technical Instructions for Completing Property Report and Lease Addendum. It shall begin with the words "Property Report" and shall be verbatim to that found effective with this Office. Also, it shall have no covers, pictures, emblems, logograms, or identifying insignia other than that set forth in the Regulations.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the Regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

Ex. 16

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension proceedings.

Any questions in regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

George K. Bernstein
Interstate Land Sales Administrator

By John R. McDowell
Deputy Administrator

4-5-74

A 9194

13B

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D.C. 20410

IN REPLY REFER TO:

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the above-specified Amendment to the Statement of Record of the captioned subdivision became effective _____. This letter has no retroactive effect upon your operation or sales.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and two copies of the final printed version of the Property Report so that such documents may become part of the filing. This amendment did not include a revision to the Property Report. The effective date indicated above need not appear on the face thereof.

The Property Report shall be in accordance with Section 1710.110, Part B, Technical Instructions for Completing Property Report and Lease Addendum. It shall begin with the words "Property Report" and shall be verbatim to that found effective with this Office. Also, it shall have no covers, pictures, emblems, logograms, or identifying insignia other than that set forth in the Regulations.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the Regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

EK. 17

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension proceedings.

Any questions in regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

George K. Bernstein
Interstate Land Sales Administrator

By John R. McDowell
Deputy Administrator

4-5-74

A 9196

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D.C. 20410

IN REPLY REFER TO:

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the above-specified Amendment to the Statement of Record of the captioned subdivision became effective on the date of this letter. This letter has no retroactive effect upon your operation or sales.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and three (3) copies of the final printed version of the Property Report so that such documents may become part of the filing. This amendment did not include a revision to the Property Report. The effective date indicated above need not appear on the face thereof.

The Property Report shall be in accordance with Section 1710.110, Part B, Technical Instructions for Completing Property Report and Lease Addendum. It shall begin with the words "Property Report" and shall be verbatim to that found effective with this Office. Also, it shall have no covers, pictures, emblems, logograms, or identifying insignia other than that set forth in the Regulations.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the Regulations requires that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

EAN

EX. 18

Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension proceedings.

Any questions in regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

John R. McDowell
Interstate Land Sales Administrator (Acting)

A 9198

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF INTERSTATE LAND SALES REGISTRATION
WASHINGTON, D.C. 20410

IN REPLY REFER TO:

Pursuant to Section 1407(a) of the Interstate Land Sales Full Disclosure Act the above-specified Amendment to the Statement of Record of the captioned subdivision became effective on the date of this letter. This letter has no retroactive effect upon your operation or sales.

If you have not already done so, you should furnish this Office, within 20 days, the final printed version of the contract and three (3) copies of the final printed version of the Property Report so that such documents may become part of the filing. This amendment included a revision to the Property Report. The effective date indicated above must appear on the face thereof.

The Property Report shall be in accordance with Section 1710.110, Part B, Technical Instructions for Completing Property Report and Lease Addendum It shall begin with the words "Property Report" and shall be verbatim to that found effective with this Office. Also, it shall have no covers, pictures, emblems, logograms, or identifying insignia other than set forth in the Regulations.

As provided in Section 1407(c) of the Act, if at any time subsequent to the above effective date a change shall occur affecting any material fact required to be contained in the Statement of Record, the Statement shall be amended to show such change. Section 1710.23 of the Regulations required that such amendment be filed within 15 days of the date on which the developer knows or should have known that there has been a material change.

EAC EK.19

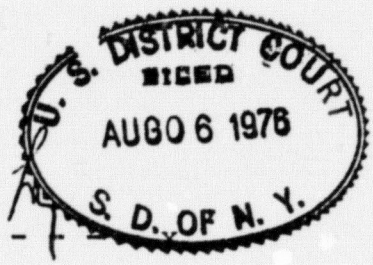
Under Section 1407(d) of the Act, if it appears to the Secretary that an effective Statement of Record includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, such Statement of Record may be subject to suspension proceedings.

Any questions in regard to the subject matter of this letter should be addressed to this Office.

Sincerely,

John R. McDowell
Interstate Land Sales Administrator (Acting)

A 9200



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA S 76 CR. 644 (CMM)

-against-

AMREP CORPORATION, et al.,

Defendants.

- x

UNITED STATES OF AMERICA 75 CR. 1023 (CMM)

-against-

AMREP CORPORATION, et al.,

Defendants.

NOTICE OF MOTION

- x

PLEASE TAKE NOTICE that upon the superseding indictment (S 76 CR. 644), the original indictment (75 CR. 1023), and all prior papers and proceedings herein, defendant Solomon H. Friend will move this Court, at a time and place to be fixed by the Court, (a) to renew the previous motions to dismiss the indictment and to sever defendant Friend for a separate trial, filed on January 23, 1976, and all other motions heretofore made by said defendant, and to make said motions applicable to the superseding indictment herein, (b) for an order granting said motions on the grounds originally asserted, and upon the additional grounds set forth in the motions for reconsideration filed on behalf of defendant Friend on August 3, 1976, and (c)

for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

August 5, 1976

Yours, etc.

ROGERS & WELLS

By _____
Attorneys for Defendant
Solomon H. Friend
200 Park Avenue
New York, New York 10017
Tel. No. (212) 972-7000

TO: Robert B. Fiske, Jr., Esq.
United States Attorney
ATTENTION OF:
Patricia M. Hynes, Esq.
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007

CC: George Gallantz, Esq.
Proskauer, Rose, Goetz & Mendelsohn, Esqs.
Attorney for Defendants:
AMREP Corporation
Rio Rancho Estates, Inc.
A.T.C. Realty Corporation
300 Park Avenue
New York, New York 10022

Peter Fleming, Esq.
Curtis, Mallet-Prevost, Cost & Mosle, Esqs.
Attorney for Defendants:
Chester Carity
Daniel Friedman
100 Wall Street
New York, New York 10005

Stanley S. Arkin, Esq.
Attorney for Defendants:
Howard W. Friedman
Henry L. Hoffman
300 Madison Avenue
New York, New York 10017

Jack Hoffinger, Esq.
Attorney for Defendant:
Irving Blum
10 East 53rd Street
New York, New York 10022

Carl J. Rubino, Esq.
110 East 59th Street
New York, New York 10022

A 9202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Metzner, J.

UNITED STATES OF AMERICA :

-v- :

AMREP CORPORATION, : S 76 Cr. 644
RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION, : NOTICE OF MOTION
HOWARD W. FRIEDMAN,
CHESTER CARITY, :
IRVING W. BLUM,
HENRY L. HOFFMAN, :
HERMAN B. OBERMAN,
SOLOMON H. FRIEND, :
and DANIEL FRIEDMAN,
:
Defendants.
:

UNITED STATES OF AMERICA
:
-v-
:
AMREP CORPORATION,
RIO RANCHO ESTATES, INC., : 75 Cr.1023 (CMM)
ATC REALTY CORP.,
HOWARD W. FRIEDMAN, : NOTICE OF MOTION
CHESTER CARITY,
IRVING W. BLUM, :
HENRY L. HOFFMAN,
HERMAN B. OVERMAN, :
SOLOMON H. FRIEND,
and DANIEL FRIEDMAN, :

Defendants. :

PLEASE TAKE NOTICE that upon the attached Affidavit of SOLOMON H. FRIEND, sworn to the 3rd day of August, 1976, and the attached Affidavit of WILLIAM R. GLENDON, sworn to the 3rd day of August, 1976, the defendant SOLOMON H. FRIEND will move, as soon as he can be heard, for reconsideration of this Court's decision in 75 Cr. 1023 (CMM) dated July 22, 1976, denying the motion of SOLOMON H. FRIEND for a severance and, upon such reconsideration, for an Order granting such severance in 75 Cr. 1023

and in the superseding indictment S 76 Cr., or, in the alternative, in both cases, for an Order granting Rogers & Wells leave to withdraw as counsel for defendant, SOLOMON H. FRIEND.

Dated: New York, New York
August 3, 1976

YOURS, ETC.

ROGERS & WELLS
Attorneys for defendant,
Solomon H. Friend
200 Park Avenue
New York, New York 10017

To: Robert B. Fiske, Jr.,
United States Attorney
ATTENTION OF:
Patricia M. Hynes,
Assistant United States Attorney
One St. Andrew's Plaza
New York, N. Y. 10007

cc: George Gallantz, Esq.
Proskauer, Rose, Goetz & Mendelsohn, Esqs.
Attorney for Defendants:
AMREP Corporation
Rio Rancho Estates, Inc.
A.T.C. Realty Corporation
300 Park Avenue
New York, New York 10022

Peter Fleming, Esq.
Curtis, Mallet-Prevost, Cost & Mosle, Esqs.
Attorney for Defendants:
Chester Carity
Daniel Friedman
100 Wall Street
New York, N. Y. 10005

Stanley S. Arkin, Esq.
Attorney for Defendants:
Howard W. Friedman
Henry L. Hoffman
300 Madison Avenue
New York, New York 10022

A 9204

cc: Jack Hoffinger, Esq.
Attorney for Defendant:
Irving Blum
10 East 53rd Street
New York, New York

Carl J. Rubino, Esq.
110 East 59th Street
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -v- AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, IRVING W. BLUM, HENRY L. HOFFMAN, HERMAN B. OVERMAN, SOLOMON H. FRIEND, and DANIEL FRIEDMAN, Defendants.	S 76 Cr. (CMM) AFFIDAVIT

UNITED STATES OF AMERICA -v- AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORP., HOWARD W. FRIEDMAN, CHESTER CARITY, IRVING W. BLUM, HENRY L. HOFFMAN, HERMAN B. OVERMAN, SOLOMON H. FRIEND, and DANIEL FRIEDMAN, Defendants.	75 Cr. (CMM) AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SOLOMON H. FRIEND, being duly sworn, deposes and says:

1. I am a defendant herein and submit this affidavit

in support of the annexed motion for reconsideration of this Court's decision dated July 22, 1976 denying your deponent's motion for a severance in 75 Cr. 1023 and in support of a renewed motion for a severance in that case and in the superseding indictment (S 76 Cr.); and in the alternative, in both cases, for an Order granting my counsel leave to withdraw. The facts which give rise to the necessity for this motion are extraordinarily compelling.

2. On May 27, 1976 the Government moved by letter application to Your Honor, which has not yet been decided, to disqualify Rogers & Wells, counsel who have represented me for more than 18 months, on the ground that their continued representation may be a violation of the Professional Canons of Ethics. In that connection the Government stated "that the performance, advice and reputation of Rogers & Wells will be a central issue at the trial since Rogers & Wells represented Amrep until 1968." Rogers & Wells, then known as Royall, Koegel & Rogers, served as outside Counsel for Amrep from 1962 to 1968 and your deponent served as General Counsel for Amrep from 1970 until March 1976. By letter dated June 7, 1976, my counsel informed the Court of their view that their continued representation of me was not a violation of the Professional Canons of Ethics, and I agreed with that view. (The letters of the Government and my counsel heretofore filed, are hereby incorporated by reference.)

3. On July 19, 1976, almost nine months after the filing of the instant indictment herein, the Government filed a superseding indictment which makes clear what perhaps might not

have been altogether clear from the original indictment, namely, that everything that Amrep did since 1961--indeed, the very concept of Rio Rancho itself--was part of an alleged scheme to defraud. That new indictment clearly places in issue, inter alia, the concept and validity of the six months visitation refund guarantee provision of the contracts pursuant to which purchasers purchased lots at Rio Rancho, the concept and validity of the land exchange privilege, and, indeed, even the motives underlying the construction by Amrep of substantial housing, improvements and amenities. All of these concepts were in existence when your deponent became General Counsel in 1970.

4. On July 30, 1976 my counsel was informed by counsel representing other defendants herein, that they intend to call as part of their defense, present members of Rogers & Wells to testify as to the nature and scope of the retainer of Rogers & Wells during the seven-year period that that law firm served as outside Counsel for Amrep.

5. The belated attempts by the prosecutor to disqualify counsel of my choice, coupled with the intention of the other defendants to defend against the indictment by calling present members of the law firm which represents me, has placed me in an intolerable position which seriously threatens my constitutional right to a fair trial with counsel of my choice. Thus, at the trial, the Government, on one hand, will attempt to attack and undermine the performance and advice of Rogers & Wells while they served as outside Counsel for Amrep, while the defendants, on

the other hand, will attempt to demonstrate that the performance and advice of Rogers & Wells was exemplary, and that in any event, they relied upon such advice in good faith. In effect, under the contentions being urged by the other parties to this litigation, not only will my conduct and professional ability as outside counsel to Amrep be on trial, but the conduct and professional ability of the law firm which has represented me for eighteen months may also be subjected to judicial scrutiny. While my counsel is defending your deponent, they themselves possibly will be caught in a whipsaw by the competing and conflicting contentions of the other parties to this litigation.

6. By reason of the aforementioned circumstances, I am deeply concerned that I will be unable to receive a fair trial, with counsel of my choice, if I am tried jointly with the other defendants. The indictment charges me with participating in a fraud involving virtually everything which Amrep did since 1962--matters which occurred during the seven-year period when Rogers & Wells served as outside counsel. I am charged with participating in this fraud even though I did not join Amrep as General Counsel until 1970. A trial of the charges against me, if ~~it is~~ to be truly a fair trial, should be uncomplicated by any cross attacks by the other parties to this litigation on the conduct of the law firm which has represented me for eighteen months.

WHEREFORE, you deponent respectfully requests that a severance should be granted or, alternatively, that an Order be

entered allowing my attorneys, Rogers & Wells, leave to withdraw.

Solomon H. Friend

SOLOMON H. FRIEND

Sworn to before me this
3rd day of August, 1976.

Guy C. Quinlan

GUY C. QUINLAN
NOTARY PUBLIC, State of New York
No. 31-3183686
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-v- :

AMREP CORPORATION, :
RIO RANCHO ESTATES, INC., :
ATC REALTY CORPORATION, : S 76 Cr. (CMM)
HOWARD W. FRIEDMAN, :
CHESTER CARITY, : AFFIDAVIT
IRVING W. BLUM, :
HENRY L. HOFFMAN, :
HERMAN B. OVERMAN, :
SOLOMON H. FRIEND, :
and DANIEL FRIEDMAN, :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-v- :

AMREP CORPORATION, :
RIO RANCHO ESTATES, INC., :
ATC REALTY CORP., : 75 Cr. (CMM)
HOWARD W. FRIEDMAN, :
CHESTER CARITY, : AFFIDAVIT
IRVING W. BLUM, :
HENRY L. HOFFMAN, :
HERMAN B. OVERMAN, :
SOLOMON H. FRIEND, :
and DANIEL FRIEDMAN, :

Defendants. :

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM R. GLENDON, being duly sworn, deposes and says:

I am a member of the firm of Rogers & Wells, attorneys

for the defendant, SOLOMON H. FRIEND, and submit this affidavit in connection with the annexed motion which Mr. Friend has instructed us to make.

In view of Mr. Friend's affidavit, and his stated concern for a fair trial expressed therein, I am constrained to advise the Court that, in my view, this firm can no longer serve effectively as counsel for Mr. Friend and we wish, therefore, to be relieved as such counsel as soon as possible.

WILLIAM R. GLENDON

Sworn to before me this
3rd day of August, 1976.

GUY C. QUINLAN
NOTARY PUBLIC, State of New York
No. 31-3183036
Qualified in New York County
Commission Expires March 30, 1977

A 9212

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

Plaintiff, : 75 Cr. 1023 (CMM)

-against- :

AMREP CORPORATION, RIO RANCHO ESTATES, INC., et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT OF DEFENDANT FRIEND'S MOTION TO DISMISS

We submit this memorandum in order to point out certain matters which it appears the Court may have overlooked in denying Mr. Friend's motion to dismiss the indictment for failure to give him the required target warning when he appeared before the Grand Jury on January 28, 1975.

The motion was denied because this Court concluded that the Government had given Mr. Friend "a sufficient warning on its facts under the Jacob test."* The opinion shows that this conclusion was based upon two factors: (1) the Assistant United States Attorney, by affidavit, had sworn that: "on

* United States v. Jacobs, Docket No. 75-1319 (2d Cir. Feb. 24, 1976).

January 28, 1975 Friend was not a target of the land fraud investigation"; and (2) Mr. Friend did "not indicate that his questioning on that day exceeded the bounds of the warning" which he was given only concerning obstruction of justice. (Opinion, pp. 1-2). The following discussion of each of these two factors shows, we respectfully submit, that the Court's conclusion was in error.

First, while Ms. Hynes' affidavit (¶5) did claim that Mr. Friend was not a "target" on January 28, that statement, we suggest, constituted little more than semantic legerdemain. For, in the same affidavit (¶6), Ms. Hynes conceded that she had told Mr. Arkin, also on January 28, after Mr. Friend's Grand Jury appearance, that Mr. Friend "could not be ruled out as a target".* This latter statement is the determinative factor on the instant question, since, as discussed below, target warnings must be given to a person who "is or might become" a target.

Furthermore, uncontradicted affidavits submitted in support of Mr. Friend's motion prove that he was advised of his target status on January 28, within hours after he had

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* As noted in the affidavits of Mr. Arkin submitted in support of Mr. Friend's motion, other individuals who were subsequently indicted were, early on in the investigation, told that the Government could not say they were not targets, and that this was a standard means of giving a target warning in this District. See Arkin Reply Aff., sworn to March 23, 1976, ¶¶ 1-3.

testified.* Not only did the Government fail to contest those affidavits, but, as noted, Ms. Hynes' own affidavit confirmed the accuracy thereof. Indeed, in the decision denying the motions by AMREP and by Mr. Friend for a severance, this Court specifically found that Friend was advised of his target status concerning the land fraud investigation on January 28. There, Your Honor stated: "Friend severed the attorney-client relationship on January 28, 1975 when he was advised that he was a target of the Grand Jury investigation." (Opinion, p. 2; emphasis supplied).

The Government has never explained why, if Mr. Friend was not a potential defendant of the fraud investigation when he testified on January 28, he was given a target warning thereupon only hours later on the same day. Accepting, arguendo, the Government's contention (Hynes Aff., ¶5) that Mr. Friend was questioned on January 28th only about the alleged obstruction, there can be only one conclusion: Mr. Friend must have been a potential defendant of the fraud investigation before he testified.

Accordingly, in light of the uncontradicted affidavits and the Government's admission, noted above, and of this Court's own finding, quoted above, we urge reconsideration of

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* See affidavits of: Mr. Friend, sworn to January 23, 1976, ¶¶ 7-8; Theodore Schreier, Esq., sworn to March 18, 1976, ¶ 2; and Stanley Arkin, Esq., sworn to January 23, 1976, ¶ 6.

this Court's conclusion that Mr. Friend was not a target on January 28, 1975 when he was called before the Grand Jury.

Second, we respectfully suggest that the record simply does not support this Court's statement that Mr. Friend failed to contend that his questioning on January 28 had "exceeded the bounds of the warning" he was given on obstruction of justice. To the contrary, we specifically noted in the memoranda submitted in support of Mr. Friend's initial motion that the questioning had exceeded mere obstruction of justice matters. For example, Mr. Friend was questioned extensively on January 28 about the Henniger Report, allegedly an important document to the underlying investigation and a document which ultimately formed the basis for one or more of the allegations in the indictment. Questions were put to him about his knowledge of the Report as well as the knowledge of other persons subsequently indicted. All of this, of course, is reflected in the transcript of the Grand Jury Proceedings on January 28, 1975.*

Any possible doubt that this questioning related to the underlying fraud investigation was removed by Ms. Hynes' representations to this Court at a hearing on May 17, 1976. There, she stated that the Government thought the testimony

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* See our initial Memorandum dated January 23, 1976, p. 5, and our Reply Memorandum dated March 23, 1976, p. 7.

was relevant to the Grand Jury's fraud investigation, "as to the role that was played by Mr. Carity, and . . . as to the role that was played by Mr. Friend." The Government thought that the testimony "pointed to consciousness of guilt if nothing else." And, Ms. Hynes admitted that Mr. Friend's testimony on January 28 related to what the Government regarded as "a very crucial point in this case which was, was there a master plan, and if there was what was it"? (Tr. 62)

Furthermore, if the testimony had related only to the aborted obstruction of justice inquiry, there would have been no reason for the Government to read it to the additional Grand Jury convened in February 1975 to complete the fraud investigation. Yet, the Government has conceded that the testimony was so read. (Hynes Aff., sworn to March 15, 1976, ¶ 8).

In short, Mr. Friend did indicate that the questioning on January 28 "exceeded the bounds of warning" that he was given. It went beyond mere obstruction of justice matters and related directly to the fraud investigation. And, we suggest, this position is confirmed by the conceded facts in the record.

The policy of the United States Attorney's Office for the Southern District of New York concerning target warnings was expressly confirmed on December 2, 1975 in a response to a questionnaire circulated by the Second Circuit during the

Jacobs case. Mr. Cahill, then United States Attorney for this District, stated:

> "It is our general practice to advise a witness before the Grand Jury who is or might become a target of the investigation of his status in this regard."* (emphasis supplied)

Here, facts in the record not discussed in this Court's opinion leave no real doubt that, when Mr. Friend was subpoenaed before the Grand Jury on January 28, 1975, the Government must have known that he "[was] or might become a target" of the investigation into mail fraud. Thus, he was told, only hours after he had testified, of his target status in the fraud investigation. Further, the Government had to know, when Mr. Friend was called before the Grand Jury on January 28th, that he would be questioned about, as Ms. Hynes put it, "a very crucial point" in the fraud case. And, the importance to the fraud case of the Government's questioning of Mr. Friend on January 28 was confirmed when that testimony was read to the additional Grand Jury. In short, the facts show that the Government's conduct here falls squarely within that proscribed by the Second Circuit in Jacobs.

Conclusion

We submit that this Court should, in view of the

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* By letter dated March 29, 1976, we provided to this Court a copy of Mr. Cahill's response, as well as the questionnaire.

matters discussed above, reconsider its order denying Mr. Friend's motion to dismiss, and, upon such reconsideration, vacate that order and grant the motion. At the very least an evidentiary hearing, as was requested by Mr. Friend, should be held on the dismissal question.

Dated: August 3, 1976

Respectfully submitted,

ROGERS & WELLS
Attorneys for Defendant
Solomon Friend
200 Park Avenue
New York, New York 10017
(212) 972-7000

Of Counsel:

William R. Glendon
Guy C. Quinlan
James B. Weidner

:lq
0906
102

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : S 76 Cr. 644 (CMM)

AMREP CORP., et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FRIEND'S RENEWED MOTIONS FOR SEVERANCE AND DISMISSAL AND THE MOTION OF FRIEND AND ROGERS & WELLS TO PERMIT ROGERS & WELLS TO WITHDRAW FROM THE CASE

Preliminary Statement

This memorandum is submitted in opposition to defendant Friend's motion for reconsideration of this Court's decision denying his motions for a severance and for dismissal of the indictment for an alleged failure to give him adequate target warnings. The Government submits that the only relief to which Friend is entitled is the granting of his alternative motion to permit his attorney, Rogers & Wells, to withdraw from the case. Such withdrawal will eliminate the basis for his most recent complaint. However, any withdrawal should not be permitted to delay the trial now scheduled for October 5, 1976.

Statement of Facts

On January 23, 1976, defendants Friend and Amrep Corp. filed motions asking a severance of Friend from the trial on the grounds that Friend's participation at trial and the defense he intended to present would violate Amrep's lawyer-client and councils of defense relationship with Friend. On July 23, 1976, this Court denied the severance motions on the grounds that:

(1) "The Court has not been furnished with anything concrete to show prejudice justifying a severance." Op. 3; and

(2) "Only a small portion of the total evidence on the part of the defense might be included in privileged material. The resolution of the claims of work product can await the presentation of the issue at trial." Op. 5.

In May 1976, three months ago and almost five months before the scheduled trial date, this office informally advised Mr. Glendon, counsel for defendant Friend, that it was highly possible that his firm's conduct and advice throughout the course of the criminal activities alleged would become a factual issue at trial and that he should consider whether he should withdraw from the case in view of Canon 5 of the Code of Professional Responsibility, Disciplinary Rules 5-101 and 5-102 and Ethical Considerations 5-9 and 5-10 thereof. Mr. Glendon rejected the Government's suggestion, both as legally unsound and because he concluded

that it was inconceivable that Rogers & Wells' conduct and advice would become an issue at trial.

Thereafter, by letter dated May 27, 1976, the Government advised the Court of the problems inherent in Rogers & Wells' continued representation of Mr. Friend and suggested that the Court explore the problems with the affected parties. In a reply letter to the Court, dated June 7, 1976, Mr. Glendon stated, "We do not intend to call any present member of this firm as a witness . . . . Nor do we have any reason to believe that any such member may otherwise be called, or that, even if called, his testimony would be prejudicial to Mr. Friend."

At a hearing on June 22, 1976, concerning these and other potential conflicts, in the presence of counsel for other defendants, the Government repeated its basis for believing Rogers & Wells might be a witness at trial. (Tr. 24-29). At that time Mr. Glendon repeatedly stated that he did not understand the Government's position; that the ethical considerations had no relevance to the facts of this case; and that since Mr. Winslow, the firm partner handling the Amrep account, left Rogers & Wells in 1968, "our connection with this case is non-existent as far as that is concerned." (Tr. 32).

Defendant Friend now alleges that on July 30, 1976, counsel for other defendants informed his counsel

for the first time "that they intend as part of their defense to call present members of Rogers & Wells to testify as to the nature and scope of the retainer of Rogers & Wells during the seven-year period in which that law firm served as outside Counsel for Amrep."

ARGUMENT

I. THE MOTION FOR SEVERANCE MUST AGAIN BE DENIED.

Defendant Friend claims that he has suddenly learned that Amrep's former attorney, Roger & Wells, will have partners testifying as defense witnesses at trial and that such testimony will necessarily deprive him of a constitutionally fair trial unless he is severed from the trial of his co-defendants. Friend's most recently discovered claim contributes nothing new to justify granting his severance motion.

The Government contended throughout its original motion papers opposing severance, that given the nature of this business fraud and the affidavits submitted in support of the defendants' pretrial motions which discussed advice from and reliance upon lawyers during the commission of the crime, it was obvious that advice of counsel would be a key defense in this case. Once the defendants raise an advice of counsel defense, they waive all claims of attorney-client privilege, and therefore the defendant Friend would be free to present his own defense without fear of violating

his client's rights or his own ethical obligations. For that reason alone, the Government contended severance, at least pretrial, was unnecessary and unjustifiable. The Court denied the severance motions upon the grounds that the defendants had made an insufficient showing to establish a basis for severance.

Defendant Friend now contends that he is entitled to a separate trial solely because his co-defendants have indicated to him that they intend to call partners at Rogers & Wells as witnesses for the defense.* Nonetheless, there is nothing about the possibility of the testimony of any partners of Rogers and Wells which requires severance. In fact, Mr. Glendon's letter dated June 7, 1976 specifically stated "Nor do we have any reason to believe . . . that, even if [a member of Rogers & Wells is] called, his testimony would be prejudicial to Mr. Friend."

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* It is at least curious to note that Friend has failed to produce the affidavits of any counsel for co-defendants or Rogers & Wells' partners stating who in fact will be called as a witness and what if anything they will testify to. Friend asks the Court to instead adopt his own second-hand assertions and then proceed to speculate about the hypothetical testimony.

Friend's renewed application has totally failed to establish the necessity for two long and substantially duplicative trials, especially in view of the more sensible remedy of withdrawal which is available.

II. THE ONLY APPROPRIATE REMEDY IS TO GRANT ROGERS & WELLS' MOTION TO WITHDRAW.

Both Friend and Rogers & Wells concede that one perfectly acceptable way to solve the problem presented is to permit Rogers & Wells to withdraw immediately. Since the defendant suggests this alternative and it is far simpler than creating the need for a second, long trial, the Government agrees that the application should be granted.

However, to the extent that Friend's motion implies that this turn of events is unexpected or perhaps related somehow to the filing of the superceding indictment, we wish to make clear that this is totally contradicted by the record in this case. It has been clear to all parties to this litigation that advice of counsel would be a principal defense for the corporation and its controlling officers. The defendants' own pretrial motions and affidavits make clear that they have always fully intended to present the

2102

advice of counsel defense at trial.* Accordingly, it has certainly been foreseeable that Rogers & Wells' partners would testify at trial.

By waiting until the last minute to concede the obvious fact that advice of counsel will be a key defense, Friend apparently hoped to avoid, on the one hand, the crucial admission that his own attorney-client severance motion had no validity, and, on the other hand, an early acknowledgement that Rogers & Wells was required to withdraw.

III. FRIEND'S MOTION TO DISMISS SHOULD NOT BE GIVEN RECONSIDERATION.

On January 23, 1976, the defendant Friend moved to dismiss the indictment "on the ground that, in grand jury proceedings, defendant Friend was deprived of his rights under the Fifth and Sixth Amendments to the Constitution." The essence of Friend's application was that he should have been told he was a target of the mail fraud investigation when he first appeared before the Grand Jury on January 28, 1975. After exhaustive affidavits and briefs were submitted by the parties, this Court denied Friend's motion on July 22, 1976, on the grounds that Friend had "a

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* See, for example: affidavit of Edward B. Winslow, Esq., dated January 22, 1976, in support of Friedman -- Hoffman motion to dismiss the indictment; affidavit of George B. Gallantz, Esq., dated January 23, 1976, ¶7, in support of Amrep's motion for severance; affidavit of William R. Glendon, Esq., dated January 23, 1976, ¶15, in support of Friend's motion for severance.

sufficient warning" under United States v. Jacobs, 531 F.2d 87 (2d Cir. 1976).

Friend has moved for reconsideration of his motion for dismissal of the indictment. However, this motion fails to allege any new facts and makes no argument which was not exhaustively set forth in the previous briefs and at oral argument on the motion. Since absolutely nothing new has been raised by the instant motion, the Government will rest upon its previous submissions on this issue, which fully answered each of the reareguments now offered, and upon this Court's opinion and not repeat that material.

CONCLUSION

For all of the reasons stated above, this Court should deny reconsideration of Friend's motions to sever and to dismiss, and should grant the motion permitting Rogers & Wells to withdraw from this case.

Respectfully submitted,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
Assistant United States Attorneys
Of Counsel

A 9227

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

AMREP CORPORATION, et. al.

Defendants.
----------x

S76 Cr. 644 (CMM)

REPLY AFFIDAVIT

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

SOLOMON H. FRIEND being duly sworn, deposes and says:

1. I am a defendant herein, presently represented by Rogers & Wells, and submit this affidavit in reply to the government's Memorandum of Law opposing my renewed motion for severance and for leave to permit Rogers & Wells to withdraw as my counsel.

2. The government has missed the thrust of the motions in issue. As the moving papers make clear, the motion seeks leave to permit Rogers & Wells to withdraw from the case in the event, and only in the event, that I am required to stand trial jointly with the other defendants. The motion papers point out that under the extraordinarily compelling circumstances wherein I have been represented by Rogers & Wells for more than 18 months, and wherein the government has filed a superseding indictment virtually on the eve of trial, a severance would be a more appropriate method of resolving the dilemma in which I and my counsel find themselves, rather than to require me at this late date to retain other counsel. Indeed, in this connection on June 22, 1976, the court itself recognized that a severance would resolve the dilemma, stating:

> "MR. GALLANTZ: ...all the reference to the disciplinary rule disappear the moment there is a severance.
> THE COURT: I told that to my law clerk on the way down...
> THE COURT: That I could solve the problem by granting the motion to sever." (Transcript, Oral Argument, June 22, 1976 pp.32-33)

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3. A severance would eliminate the necessity for me to retain other counsel because at a separate trial, the other defendants would no longer be parties to the litigation and thus would be in no position to call present or former members of Rogers & Wells as witnesses. Moreover, it does not appear that the government has any intention of calling any present members of Rogers & Wells. As such, at a separate trial my counsel would not be subjected to the whipsawing effect of conflicting contentions on the part of the other parties to this litigation.

4. As Mr. Glendon stated in his letter to the court dated June 7, 1976, he has no intention of calling any present member of his firm as a witness in my behalf, "nor do we have any reason to believe that any such member will otherwise be called or that even if called, his testimony will be prejudicial to Mr. Friend." At a separate trial of me the situation would be exactly as thus stated in that no present member of the Rogers & Wells firm would be called by any party to the litigation.

5. The government's memorandum suggests that my moving affidavit stating that counsel for the other defendants have informed Mr. Glendon that they will call as witnesses present members of the Rogers & Wells firm are "second hand assertions." (Government's opposing memorandum p. 5, footnote). While perhaps second hand, my assertions are absolutely correct. On July 30, 1976 Mr. Glendon was informed by Stanley S. Arkin, counsel for defendants Howard W. Friedman and Henry L. Hoffman, that he intended to call as witnesses present members of Rogers & Wells to testify as to the nature and scope of the retainer of Rogers & Wells during the seven year period in which

Rogers & Wells served as outside counsel for AMREP. In addition, Mr. Arkin informed Mr. Clendon that it was likely that Proskauer, Rose, Goetz & Mendelsohn, attorneys for the corporate defendants, also intended to call present members of Rogers & Wells. In this connection, there are submitted herewith affidavits of Stanley S. Arkin and of a partner of Proskauer, Rose, Goetz & Mendelsohn, affirming their intentions with regard to the calling of present members of Rogers & Wells, thereby conclusively eliminating any claim that my concerns are mere "second hand assertions" or "mere speculation about hypothetical testimony." As the affidavits make clear, there is nothing hearsay, speculative or hypothetical about the intentions of the other defendants.

6. The government's memorandum minimizes, if not totally ignores, the fact that a superseding indictment was filed almost nine months after the original indictment which makes absolutely clear what perhaps was not altogether clear in the original indictment, namely, that the Rio Rancho concept was/allegedly criminal in nature from its inception and continued as such for almost ten years before I became in house general counsel in 1970. Instead, the government asserts that it is I who have waited "until the last minute to concede the obvious fact that advice of counsel will be a key defense." (Government's memorandum p. 7). The government conveniently ignores that it itself waited almost 18 months before informing my counsel that their conduct would be a central issue in this case. Further, the government ignores the fact that its belated superseding indictment is claimed by counsel for other defendants herein as constituting a change in the theory of the government's case.

7. Your deponent respectfully urges that apart from the duplication of substantial legal expenses, it would be

manifestly unjust to require me at this late date to attempt to retain other counsel. This is an extremely complex litigation which has consumed almost three years of the government's time. The number of pages of documents which the government intends to offer on its direct case have been represented to the court as ranging from 8,000 to approximately 70,000, and I have just learned that the government intends to call approximately 400 witnesses on its case. Only counsel with expert experience before the criminal bar could be expected to handle my case, and even such counsel would require substantial time to adequately prepare my defense. This is particularly true here, where the charges against me appear to be based on a highly sophisticated theory of criminal liability which questions the bona fides of the legal advice given by an attorney. Obviously, a defense to such a theory likewise requires sophisticated and knowledgeable counsel with intensive factual and legal preparation.

8. Even absent the unprecedented circumstances presented herein, the court itself recognized in its opinion denying the original motion for severance that the "motion raises a difficult problem..." and that "the government must understand that it might be met with a successful motion either by AMREP or Friend to be severed (at the trial) depending on the circumstances." Clearly the original motion papers presented compelling circumstances for a severance. These circumstances, however, have become infinitely more aggravated by the filing of a belated superseding indictment and the intention of the other counsel to call present members of Rogers & Wells as witnesses in their behalf.

9. In the interests of justice and in the exercise

of this court's discretion, a severance should be granted to assure me a fair trial consonant with my constitutional right to counsel of my choice.

NEW YORK STATE
NEW YORK COUNTY

Sworn to before me this

17TH day of August, 1976.

Claire Olsher

CLAIRE OLSHER
NOTARY PUBLIC STATE New York
No. 31-8216325
Qualified in New York County
Commission Expires March 30 1978

Solomon H. Friend

SOLOMON H. FRIEND

A 9252

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

EILEEN SOUTHER being duly sworn, says: that I am not a party to the action, am over the age of 18 years and that on the 19th day of August, 1976, I served a true copy of the within Reply Affidavit of Solomon H. Friend, sworn to August 17, 1976; the Affidavit of Stanley S. Arkin, sworn to August 17, 1976; and the Affidavit of George Gallantz, sworn to August 18, 1976, upon the attorneys hereinafter named at the places hereinafter stated and set opposite their respective names by depositing same, properly enclosed in a postpaid wrapper, in a Post Office box regularly maintained by the Government of the United States and under the care of the Post Office, in the City of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action to wit:

Name:	Address:	Attorney for:
Stanley S. Arkin	300 Madison Avenue New York, N.Y. 10017	defendants Howard Friedman and Henry Hoffman
Peter Fleming, Esq. %Curtis, Mallet-Prevost, Colt & Mosle	100 Wall Street New York, N.Y. 10005	defendants Carity and Daniel Friedman
George Gallantz, Esq. %Proskauer, Rose, Goetz and Mendelsohn	300 Park Avenue New York, N.Y. 10022	defendants Amrep, Rio Rancho Estates, and ATC Realty Corp.
Jack Hoffinger, Esq.	10 E. 53rd Street New York, N.Y. 10022	defendant Irving Blum
Carl Rubino, Esq.	110 E. 59th Street New York, N.Y. 10022	defendant Herman Oberman
Patricia M. Hynes, Esq. Asst. U.S. Attorney	U.S. Dept. of Justice One St. Andrews Plaza New York, N.Y. 10007	

NEW YORK STATE)
NEW YORK COUNTY)
Sworn to before me this
19th day of August, 1976.

Claire Olsher

CLAIRE OLSHER
NOTARY PUBLIC, State of New York
No. 31-02-6815
Qualified in New York County
Commission Expires March 30 1978

Eileen Souther
EILEEN SOUTHER

A 9233

U.S. DISTRICT COURT
AUG 25 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644 (CMM)

AMREP CORPORATION, ET AL., : AFFIDAVIT

Defendants. :

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

STANLEY S. ARKIN, being duly sworn, deposes and says:

1. I am a member of the firm of STANLEY S. ARKIN, p.c. My firm represents Howard Friedman and Henry Hoffman in the above-entitled case. I submit this affidavit in connection with the renewed motion of defendant Solomon Friend, in which I joined, for a severance, or in the alternative, to permit Rogers & Wells to withdraw as his counsel.

2. On May 28, 1976, Ms. Hynes addressed a letter to this Court stating that the legal advice and conduct of Rogers & Wells would be a central issue in this case and that the continued representation of Mr. Friend by Rogers & Wells was a violation of the canons of ethics. Prior to May 28, 1976, as part of my clients defense that they relied in good faith on advice of counsel, I had intended to call Edward Winslow, Esq., a former partner of Rogers & Wells. Ms. Hynes letter, however, caused me to investigate more fully the role of Rogers & Wells in the representation of AMREP during the seven years that Royall, Koegel & Wells, the predecessor firm to Rogers & Wells, served as outside general counsel to AMREP.

3. The firm of Royall, Koegel & Wells was retained by the AMREP Corporation from 1961-1968 as outside general counsel

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to do its legal work.[1] Eugene Bondy, Esq., presently a partner at Rogers & Wells, was the attorney first consulted by AMREP. Thereafter the AMREP account was primarily handled by Edward Winslow, Esq., but on various occasions other attorneys at Royall, Koegel & Wells worked on AMREP's legal affairs. In 1970 AMREP formed its own in house legal department, but outside counsel continued to provide substantial legal services to the company.

4. Royall, Koegel & Wells was retained in 1961 to act as outside general counsel, to handle virtually all of AMREP's legal affairs. The firm first handled the merger which marked the entry of the AMREP Corporation into the land development business. Thereafter the retainer of Royall, Koegel & Wells included, among other things, the acquisition of the original land which comprised Rio Rancho, the reviewing of the advertising to be used by AMREP to ensure that it was legally sound, the reviewing of the consumer land purchase contracts which contained the six months visitation and the exchange provisions, and ensuring that AMREP complied with all state laws governing the registration and sale of land at Rio Rancho, and requisite consumer disclosures relating thereto.

5. A major thrust of the indictment in this case is that virtually everything in the more than fifteen year history of AMREP's development at Rio Rancho was criminal in concept and implementation, including the advertising, the six month visitation and exchange provisions in the contracts and AMREP's compliance with state laws.

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[1] In 1968 Edward Winslow, Esq., left the firm of Ryall, Koegel & Wells and joined the firm of Jacobs, Persinger & Parker. He took the AMREP account with him. Until the present time Jacobs, Persinger and Parker has served as outside counsel for AMREP.

6. In view of the nature and scope of the indictment, I intend to call as witnesses in the defense of Messrs. Friedman and Hoffman a number of the attorneys who handled AMREP's legal affairs at Royall, Koegel & Wells, some of whom are presently at Rogers & Wells. The testimony of these witnesses on the above matters are obviously essential to refute the government's claim that Rio Rancho was criminal in its concept and implementation, and to establish the defense of good faith.

7. I have no choice but to call these witnesses in the defense of my clients, and accordingly, I have joined in the renewed motion for a severance of Mr. Friend as the appropriate method of resolving the dilemma which confronts Mr. Friend and his counsel.

Stanley S. Arkin

Sworn to before me this 17
day of August, 1976.

Notary Public

ALICE LYNN WITHERS
Notary Public, State of New York
31-4525272 - New York County
Commission Expires March 30, 1978

A 9236

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

AMREP CORPORATION, et al.,

Defendants.

S 76 Cr. 644 (CMM)

AFFIDAVIT

AUG 25 1976

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GEORGE G. GALLANTZ, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the corporate defendants herein.

2. I have read the accompanying affidavit of Stanley S. Arkin. For the reasons set forth therein, the testimony of the attorney witnesses Mr. Arkin intends to call on behalf of his clients is necessary also to the defense of the corporate defendants.

3. For the reasons stated in Mr. Friend's letter to your Honor dated August 16, 1976 and in the Arkin affidavit the corporate defendants also join in the renewed motion for a severance of Mr. Friend.

George G. Gallantz
George G. Gallantz

Sworn to before me this
18th day of August, 1976.

Notary Public

VITOLD J. de STRONIE
Notary Public, State of New York
Qualified in Queens County
Commission Expires March 30, 1977

COPY RECEIVED
ROBERT B. FISKE JR.
MAY 5 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.
by